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MONTANA LEGISLATIVE HISTORY

Chapter 432 Session L 1989
Bill House 399 Senate

History and final status sheet x
Introduced bill x
Fiscal note x
Third reading bill x
Final version of bill x

House Committee on Natural resources

Hearing date(s)* 2/1, 2/13, 2/6

Executive action (vote) date(s)*

Comm. Report 2/16

Floor 2nd reading & vote 2/18

Floor 3rd reading & vote 2/21

Senate Committee on Agriculture

Hearing date(s)* 3/10, 3/17

Executive action (vote) date(s)* 3/17

Comm. Report 3/18

Floor 2nd reading & vote 3/21

Floor 3rd reading & vote 3/23

Conference or Free Conference Comm. ____ Yes x No

Hearing date(s)* _____

Executive action (vote) date(s)* _____

* Includes minutes, exhibits, roll call, visitors register, and vote sheet if available.

Did this bill originate in an interim committee? ____ Yes x No

Committee _____ Report _____

NOTES: Bill requested by the Department of Natural Resources and Conservation.

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Compiled by: SJL

Date: June 23, 2014

HOUSE FINAL STATUS

2/06	HEARING		
2/07	COMMITTEE REPORT--BILL PASSED		
2/09	2ND READING PASSED	94	4
2/09	TAKEN FROM ENGROSSING		
2/09	REREFERRED TO APPROPRIATIONS		
3/02	HEARING		
3/16	HEARING		
3/17	COMMITTEE REPORT--BILL PASSED AS AMENDED		
3/20	2ND READING PASSED	90	7
3/22	3RD READING PASSED	79	17
	TRANSMITTED TO SENATE		
3/22	REFERRED TO FINANCE & CLAIMS		
4/05	REREFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.		
4/07	HEARING		
4/14	COMMITTEE REPORT--BILL CONCURRED		
4/15	2ND READING CONCUR MOTION FAILED	22	22
4/15	2ND READING INDEFINITELY POSTPONED	12	33
4/17	2ND READING CONCURRED	30	16
4/19	3RD READING CONCURRED	36	14
	RETURNED TO HOUSE		
4/21	SIGNED BY SPEAKER		
4/21	SIGNED BY PRESIDENT		
4/24	TRANSMITTED TO GOVERNOR		
5/18	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 686		
	EFFECTIVE DATE: 07/01/89 (S2)		
	EFFECTIVE DATE: 10/01/89 (S1)		

HB 399 INTRODUCED BY O'KEEFE, ET AL.
REVISE WATER USE LAWS
BY REQUEST OF DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

1/24	INTRODUCED		
1/25	REFERRED TO NATURAL RESOURCES		
1/26	FISCAL NOTE REQUESTED		
2/01	HEARING		
2/01	FISCAL NOTE RECEIVED		
2/03	FISCAL NOTE PRINTED		
2/16	COMMITTEE REPORT--BILL PASSED AS AMENDED		
2/18	2ND READING PASSED AS AMENDED	93	0
2/21	3RD READING PASSED	97	0
	TRANSMITTED TO SENATE		
2/28	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.		
3/10	HEARING		
3/18	COMMITTEE REPORT--BILL CONCURRED		
3/21	2ND READING CONCURRED	45	4
3/23	3RD READING CONCURRED	41	8
	RETURNED TO HOUSE		
3/29	SIGNED BY SPEAKER		
3/29	SIGNED BY PRESIDENT		
3/30	TRANSMITTED TO GOVERNOR		
4/04	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 432 EFFECTIVE DATE: 4/04/89		

HB 400 INTRODUCED BY VINCENT

HOUSE BILL NO. 399

INTRODUCED BY

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION; PROVIDING FOR A TRIAL CHANGE IN APPROPRIATION RIGHT; CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311, 85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1) Groundwater may be appropriated only by a person who has ~~either~~ a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the groundwater development works or, if another person has rights in the groundwater development works, the written consent of the person with those property rights. Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date of refiling a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall

LC 0224/01

INTRODUCED BILL
HB 399

be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of the claim of existing water right. An appropriation under this subsection is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules

adopted by the board under 85-2-113."

Section 2. Section 85-2-311, MCA, is amended to read:

"**85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) ~~throughout~~ during the period ~~during~~ in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

impoundment, use, or restraint contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, use, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 3. Section 85-2-402, MCA, is amended to read:

"**85-2-402. Changes in appropriation rights.** (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) The department, after providing notice and opportunity for hearing pursuant to 85-2-307 through 85-2-309, may approve an application for a trial change in appropriation right for a period not to exceed 3 years. In approving an application under this subsection, the department shall find from the available evidence that:

(a) substantial injury to any appropriator of water is unlikely to occur but that the precise effect of the change on other appropriators is difficult to determine in advance of the change; and

(b) the requirements of subsections (3)(b) through (3)(d) are met and it is likely that the other requirements of this section can be met.

~~(2)~~(3) Except as provided in subsections ~~(3)~~ (4) through ~~(5)~~ (6), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

~~(3)~~(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection ~~(2)~~ (3) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands ~~of~~ for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

~~(4)~~(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing

evidence and the department finds that the criteria in subsections ~~(2)~~ (3) and ~~(3)~~ (4) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

~~(5)~~(6) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of

subsection ~~(2)~~ (3) or ~~(3)~~ (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections ~~(5)(b)(ii)~~ (6)(b)(ii) and ~~(5)(b)(iii)~~ (6)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of

the state of Montana governing the appropriation and use of water.

~~(6)~~(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

~~(7)~~(8) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312~~(3)~~(5).

~~(8)~~(9) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show

cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

~~(9)~~(10) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

~~(10)~~(11) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

~~(11)~~(12) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 4. Section 85-5-302, MCA, is amended to read:

"85-5-302. **Maintenance of headgates and measuring** devices. All persons using water ~~under a decree~~ from any stream or ditch whereon a water commissioner is appointed ~~shall be~~ is required to have suitable headgates at the point ~~wherein~~ where a ditch taps a stream and shall also, at some

suitable place on the ditch and as near the head ~~thereof~~ as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in ~~such~~ the ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it ~~shall be~~ is the duty of ~~such~~ the water commissioner not to apportion or distribute any water through ~~said~~ the ditch. The commissioner ~~must~~ shall notify all parties interested by ~~registered or~~ certified mail or in person 1 week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a ~~registered or~~ certified letter to the last known post-office address of any ~~such~~ interested party ~~will be~~ is prima facie evidence of the fact that he was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay."

NEW SECTION. **Section 5.** **Extension of authority.** Any existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

NEW SECTION. **Section 6.** **Retroactive applicability.** [Sections 1 through 7] apply retroactively, within the meaning of 1-2-109, to all proceedings pending before the

department of natural resources and conservation on [the effective date of this act].

NEW SECTION. **Section 7.** Effective date. [This act] is effective on passage and approval.

-End-

STATE OF MONTANA - FISCAL NOTE
Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB399, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

HB399 would require that a possessory interest in the proposed place of use would be required by the developer of a water use project or consent of the owner of the proposed place of use before a water right certificate, water right permit, or water right change authorization can be issued by the Department of Natural Resources (DNRC). The revisions also provide that water must be reasonably available for appropriation at the proposed point of diversion before a permit can be issued. A water commissioner will have authority to inspect and control all diversion structures within jurisdictional areas.

FISCAL IMPACT: None

ASSUMPTIONS:

1. DNRC will absorb the costs associated with the proposed revisions to the water right statutes with existing resources and through the anticipated savings of less work required for responding to complaints.
2. The net result is that no additional costs are contemplated with the proposed revisions.

EFFECT ON COUNTY OR OTHER LOCAL REVENUE OR EXPENDITURES:

Proving ownership interest in property may require applicants to retrieve copies of documents from county clerk and recorders for proof of ownership information. If, for example, one-third of the persons filing notice of completions required such information, then 1,100 could be anticipated and, at $5.00 each, an additional $5,500 would be generated at the county offices.

Ray Shackleford 2/1/89

RAY SHACKLEFORD, BUDGET DIRECTOR DATE
OFFICE OF BUDGET AND PROGRAM PLANNING

Mark O'Keefe 2/02/89

MARK O'KEEFE, PRIMARY SPONSOR DATE

Fiscal Note for HB399, as introduced

HB 399

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 1, 1989, at 3:02 p.m.

ROLL CALL

Members Present: All members present with exception of:

Members Excused: Rep. Tom Hannah

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: None

HEARING ON HB 461

Presentation and Opening Statement by Sponsor:

REP. BOB REAM, House District 54, opened on the bill, which he said dealt with the Water Development Program. He said that under the state's Resource Indemnity Trust Fund, 30% of the revenues were earmarked for water development projects. He said HB 461 added or encouraged water efficiency programs or projects, and recognized these as a valid use of the funding. It would not change the priorities already established in the law, but recognized an additional factor to consider in the evaluation process on water development projects.

Testifying Proponents and Who They Represent:

Stan Bradshaw, Montana State Council of Trout Unlimited
George Ochenski, Alliance for Montana Water
Jo Brunner, Montana Water Resources Association
Robert A. Ellis, Helena Valley Irrigation District
Carol Mosher, Montana Stockgrowers Association, Montana Cattlewomen's Association
Jim Jensen, Montana Environmental Information Center

Proponent Testimony:

STAN BRADSHAW said Trout Unlimited had been actively involved in the last few years in the State Drought Task Force and also in water planning processes in the state. In both cases, he said there was considerable discussion about water use,

DISPOSITION OF HB 367

Motion: REP. O'KEEFE moved the bill DO PASS.

Discussion: None

Amendments, Discussion, and Votes: REP. O'KEEFE moved an amendment to address Rep. Gilbert's concerns. REP. GILBERT stated he would like to see language requiring the state to make an active effort to sell the property and to receive the proper amount, or fair market value.

REP. RANEY suggested that the researcher develop this language and review it with DNRC. He said the committee would then consider the amendment in executive action at a later date.

Recommendation and Vote: REP. O'KEEFE WITHDREW his motions.

HEARING ON HB 399

Presentation and Opening Statement by Sponsor:

REP. MARK O'KEEFE, House District 45, said the bill was the traditional biennium permit system water rights clean-up bill. He said it essentially dealt with general revisions to the water rights statutes. He said there were four major sections. He said the first stated that the only way a person could irrigate was with permission from the landowner. The second section stated that permits would only be issued when water was reasonably available at the point where it was to be withdrawn from the source. He said section three allowed for a three year trial change of water use. He said this would come into play when a type of use or place of use was changed. Currently, there was a burden to prove that the change would not adversely affect other water rights users in the basin, a long and involved process. He said this section would allow the department to try that change to see if it would adversely affect the situation. Section four provided for the measuring and distributing of water by the water commissioner, including permitted rights. He said that currently, there were water commissioners throughout the state who, because of the existing statute, were unsure whether they were just allowed to deal with existing, pre-1973 water rights or could deal with post-1973 permitted water rights as well.

Testifying Proponents and Who They Represent:

Don MacIntyre, Department of Natural Resources and Conservation
Stan Bradshaw, Montana Council, Trout Unlimited

Proponent Testimony:

DON MACINTYRE, attorney, testified as set forth in EXHIBIT 4.

STAN BRADSHAW said he was not there to support or oppose the bill, but rather was there to point out a potential problem with Rep. Iverson's bill that the committee might be considering in a week or so. He referred specifically to the possessory interest language in HB 399 under the change section that Mr. MacIntyre had discussed. He said that as he understood it, a person changing a right or place of use in irrigating somebody else's property would need the permission of the owner of the property to be irrigated. He said that if HB 707, a bill to allow leasing to in-stream flow purposes under the change proceeding, and this bill both passed, there could be some difficulty. He said that in many cases on a stream, the streambed was owned by the adjacent land owner. If the leasing bill met with the committee's approval, this statute would inadvertently put the applicant with the burden of having to acquire permission of how ever many people there were down the stream through whose property the water was flowing. MR. BRADSHAW said he wanted to apprise the committee of this situation that could require some adjustments to either or both statutes if the committee should decide to approve both. He said it was not the intent of Mr. MacIntyre or Rep. O'Keefe to cause problems with HB 707.

Testifying Opponents and Who They Represent:

Carol Mosher, Montana Stockgrowers, Montana Cattlewomen, and Montana Association of State Grazing Districts

Opponent Testimony:

CAROL MOSHER said that she opposed the bill from the point of view as a water rights holder and an irrigator. She said the present law stated that, in order for DNRC to issue a permit, the department must look at the entire water source, while HB 399 identified the point of diversion. She said there was quite a difference in those two things. She said the statute would have the potential of conflict and adverse affects to a senior water user who might be remote from the point of diversion.

MS MOSHER continued with the language that would basically approve a trial change for three years. She said this could invite large investments in new sprinklers and other irrigation equipment by that permit holder. At the end of that three year trial period, that permit holder would be hard to shut down because of that financial investment. She said she had been told there was no need for a three year trial period because there was plenty of data today to show who would suffer from a change. Again, she said, the senior water users in that system would suffer through periodic

diminishments of those private water users' rights during the trial period. MS MOSHER said this section could triple the amount of water litigation in the state. She claimed that the section making this law retroactive to all proceedings pending before the DNRC was changing the rules in the middle of the game and therefore inappropriate.

Questions From Committee Members:

REP. ROTH said Ms Mosher was describing a situation where there was a source and three water users with one water user downstream from numbers one and two. He said she stated that number one's rights could be infringed upon and asked how that could happen. MS MOSHER said it could occur because there would be unappropriated water available upstream. Thus the person could pump water from upstream and affect the other two below.

REP. ADDY asked Don MacIntyre to comment on this situation. MR. MACINTYRE stated that under the permitting process, the permit was junior in time to any existing right that was on the stream at the time. If there was not sufficient water for the senior, the junior permittee would not be entitled to take water. He said that was what the permit system was based upon. He said the proposed change was no different than the laws that existed before permitting existed in the state of Montana, or prior to July 1, 1973.

MR. MACINTYRE said the comment was made that there could be an adverse effect on some other party by this change. However, he directed the committee to the criteria, already in the law. There was no intention of altering those criteria. He repeated that the water rights for the prior appropriator would not be adversely affected. One of the criteria was that there was unappropriated water from the source of supply. He said the next test was whether or not that senior water right holder would be adversely affected. He said the department did not intend to change that, and would continue to look at it as it stood now.

REP. ADDY re-stated the issue. He said there were four water users, "one" with excess water, and "three" without. He said both tests would have to be met; i.e., there would have to be excess water at the new point of diversion, and no adverse effects to other water right holders before the permit would be issued. MR. MACINTYRE said if "one", "two", and "three" were already currently on the stream, and "four" was coming on, the permit would be denied if any of those current water rights were adversely affected. If "four" was further downstream, there would not be a problem because the water would have already left their return flows, and he would get the right. The problem would occur if he was above the others, and in that situation, the department would protect them.

REP. ADDY asked Ms Mosher if the explanation from Don MacIntyre answered her concerns. MS MOSHER said his explanation would be acceptable theoretically, but was not the way it worked practically. She said there could be unappropriated water upstream, and the permit could be issued to an upstream user. The senior water user downstream could be adversely affected. She said the difficulty was in the proof. REP. ADDY asked her if the theory that the statute set out answered her concern, but the actual practice did not. MS MOSHER said that was true and repeated that there could be unappropriated waters at that point of diversion. In order to satisfy the senior water rights user at some other point, there should not be a permit issued.

REP. GILBERT said he had some concerns regarding the three year change. He asked about the case in which a permit for a trial change or diversion was granted, and the individual made a substantial investment. He asked how the department could justify shutting the water user's rights off in a water shortage situation when the individual had the crop in the ground and the equipment in place.

DON MACINTYRE answered that the bill did not address permits, but instead was dealing with existing water rights and existing users, and changes in that use. He said that as the law stood at present, the user would attempt to prove that there were no adverse effects to people senior or junior to him. If his change would adversely affect either group, the change would be denied. If, however, it could be proven that the change did not appear to adversely affect either juniors or seniors, authorization would be given to go forward. At that point, the applicant for the change would also be at risk. The decision to make the investment to change to a sprinkler irrigation system would be based upon the decision of the DNRC.

MR. MACINTYRE continued with the same example, and made the assumption that the individual did affect another water right holder. Under the laws, that affected individual would have to go to district court, and if successful, the other would be forced to close down and lose the investment. He said the bill was not putting anyone at new risk, but might change the risk. It said that if the person applying for the change could give the department enough information so that it appeared that there would be no adverse effects, the department would give permission. The administrative agency would maintain jurisdiction so that after one, two or three years of a test period, a new determination could be made based on hard evidence. He said the risk was still the same, or perhaps greater under the present system.

REP. GILBERT commented that Mr. MacIntyre was assuming that the stream had no tributaries, and said that the department would allow an individual with a right to move the point of diversion. On a stream with two tributaries, when an

individual presently lower in a stream moved irrigation rights to a higher point upstream above a tributary, it could affect the source. He asked how the department would address that problem. MR. MACINTYRE replied that the department could do something about that, and that it was a part of the process. If that user wanted to move upstream, she/he would still have to show that there was a lack of adverse effect on others.

REP. GILBERT asked if the change would be permitted with stipulations, and how the department intended to handle drought situations, or other acts of nature. MR. MACINTYRE said the department anticipated the trial changes to be conditioned on various facts. He referred the committee to the criteria in the bill, and said the applicant would have to show evidence that there would not be substantial injury. He would also have to show that there would be beneficial use, that he had adequate means of diversion, and that he could meet the new criterion of possessory interest. In other words, the applicant would have to show a likelihood of success, and the agency would be given the discretion to permit the trial change so that it could develop hard evidence as to the adverse effects.

REP. GIACOMETTO asked if an individual would still have to go to the district court to appeal. MR. MACINTYRE said an individual would not appeal a trial change in court since it would still be within the jurisdiction of the department. All the evidence would then be developed, the hearing process would be completed, and the permit would be either denied or granted. At that point it would be appealable to district court.

REP. GIACOMETTO asked if, in the middle of that process, there was a drought and adverse effects were experienced, an individual could then go to district court to try to stop that process. MR. MACINTYRE said that if the irrigator, for example, was actually taking water so that he was adversely affecting others, this law would not prevent the affected individual from going into district court. Generally the injured party would ask for temporary relief in the form of an injunction. He said the bill was not intended to take away anyone's remedy. He also reminded the committee that this bill gave the department the discretion to go to a trial change.

REP. GIACOMETTO asked Carol Mosher to comment on the section that Mr. MacIntyre was addressing. MS MOSHER said that an attempt to stop an illegal use of water took time, money and caused hard feelings. She said the committee was missing the point, and referred the members to the language which indicated that it was possible that all of the source of supply could be at the point of proposed diversion.

Closing by Sponsor:

REP. O'KEEFE said there was a great deal of difference between water law theory and water law practice, a point which Ms Mosher was trying to bring out to the committee. He said the committee would have to take some time with HB 399. He said the root of the problem with the Stockgrowers' complaint had to do with the language "shall issue a permit". He said that for years the department had been unable to use discretion in the issuance of permits. The Legislature was not willing to give it the "may" there. He said that the department was insuring that the "shalls" under which it operated were the "shalls" that protected people in situations like the ones Ms Mosher mentioned.

Regarding the change requirement, he referred to Rep. Thoft's experience in the Bitterroot in trying to get a trial change, in which he had to prove no adverse effects to the department. He said the change procedure could be just as expensive as stopping an illegal diversion with the department's help. He said he would bring other comments on the bill into the committee for consideration in its deliberations.

DISPOSITION OF HB 327

Hearing 1/27/89
Executive Action 1/27/89 and 1/30/89

Motion: REP. GIACOMETTO moved the bill DO PASS AS AMENDED.

Discussion: REP. COHEN said the bill directly involved leasing the Cenex lands on the North Fork of the Flathead. He said he had sent a copy of the bill to the Superintendent of Glacier Park, and would like to consult with him. He said the area of the North Fork that the Cenex leases were on was an area that had been under a great deal of discussion. He said that the Canadians had recently agreed not to mine the coal mines of the North Fork, and there were concerns regarding oil leases in proximity to Glacier Park. REP. COHEN asked for the opportunity to gather additional information.

REP. GIACOMETTO said the bill addressed the issue of the potential loss of the lease. He asked Rep. Cohen how the concerns he was expressing would affect the bill. REP. COHEN replied that, had Cenex complied with the letter of the law, they would have never been taken to court. He said they were appealing the District Court decision to the Supreme Court. He commented that if Cenex had believed it could get by with a short-cut, and it failed, it would not behoove the legislature to extend their the corporation's lease agreements. He added that once the legal question was answered and the leases expired, Cenex along with others

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

51th LEGISLATIVE SESSION -- 1989

Date 2-1-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman	✓		
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah			✓
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

EXHIBIT 4
DATE 2-1-91
HB 399

TESTIMONY OF THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION HOUSE BILL 399

The proposed amendments to the water right statutes are intended to prevent unnecessary delays and litigation resulting from administrative processing. These amendments are expected to streamline and clarify some of the approval requirements for water rights permitting and administration. A brief explanation of each proposed revision is provided below.

Section 1

This section clarifies that a groundwater appropriator of less than 100 gpm (gallons per minute) must have an ownership interest in the proposed place of use. The law currently provides that the appropriator have an ownership interest in or consent from a landowner at the well location in the appropriation works. Now the DNRC can grant a Certificate of Water Right for the development of groundwater for use on property that is not owned by the developer. The landowner may not want the water development to proceed to protect his ownership interests. The DNRC receives a number of inquiries each year from landowners asking why the developer was allowed to appropriate groundwater for use on the landowner's property. The DNRC has explained that no restriction is placed on the developer under current law. If this revision were made to the statute the landowner would be protected from unnecessary water developments and the DNRC would spend considerably less time responding to complaints that have no administrative remedy.

This would effectively eliminate the development of groundwater on property owned by someone other than the developer, unless the developer has permission from the landowner. Water right ownership conflicts between a developer and a different landowner would be more easily resolved. This revision would also prohibit a person from acquiring exclusive water rights to a groundwater project controlled and owned by several individuals without their permission. As the statute is now administered, an appropriator may legally withdraw water from a well that is on another person's property and may apply for an increase for the place of use from the DNRC without the landowner's approval. This proposed amendment would make it clear that any new or additional appropriation of groundwater would need landowner approval.

EXHIBIT 4
DATE 2-1-89
HB 399

An example would be a tenant seeking a Certificate of Water Right for increased withdrawals from a well to expand irrigation for lawn, garden and horse pasture without the landowners knowledge. The landowner (landlord) may not want his property to be irrigated beyond historical practices, but will find that the tenant has committed considerable land to irrigation and has significantly altered the past land use practices. The landowner would have been protected from the unwanted development if the tenant would have been required to obtain landowner consent prior to receiving the groundwater Certificate of Water Right.

Another example would be when a homeowner seeks to appropriate water for a common use area within a subdivision without the consent of the owners of the common use area. If one owner wanted to install a pond or irrigate a garden within the common use area, appropriating water for that use would require permission from the owners of the common use area under the proposed revision.

Section 2

Currently a water right permit may be granted by the DNRC when water is available anywhere within the drainage basin. The statute does not specify that water must be reasonably available at the point where it will be withdrawn from the source. This amendment would clarify that water must be reasonably available at the proposed point of diversion within the drainage. This amendment is consistent with pre 1973 water law. In addition the proposed change would make it clear that water right permits may be granted by the DNRC for amounts of water and intervals of time less than that requested in the application. Objectors have argued that the statute requires DNRC to deny a permit application when water is not available for the full amount and for the entire period requested in the application. This interpretation if accepted by DNRC could prohibit potential users from receiving a permit when lesser amounts of water may be available, or full amounts may be available for an interval of time less than requested in the application. The amendment makes it clear that DNRC can continue to issue permits for appropriations of water that would be of beneficial use, and for amounts and periods less than the maximums requested.

The possessory interest criteria in the proposed place of use described for groundwater appropriations of less than 100 gpm would also be incorporated into the review criteria for permit applications. The landowner would need to give consent to new water development before a developer could appropriate water on land where the landowner has an interest.

Section 3

Historically a person has had the right to change a water right. The central test as to whether the change may take place is adverse affect to other water users. Because lack of adverse affect is often difficult to prove prospectively, this amendment would allow the DNRC to approve a water right change for a limited time to determine whether an adverse affect actually occurs. In this way both objectors and applicants maintain an administrative remedy and can avoid potential costly and time consuming litigation. The water user would have an opportunity to test the feasibility of a change in the point of diversion, place of use, place of storage or purpose of use with this revision. The trial operation would provide the user with information on the suitability of the change. This would then add to the DNRC final decision-making process and result in a more informed and reasonable determination on the merits of the change. If an applicant for a change under current law received authorization and later found the change to be inefficient and desired to return to the previous use another authorization to revert back would be required. A trial change would avoid this result.

The possessory interest described for groundwater of less than 100 gpm and for permit applications would also be incorporated into the approval criteria for changes in surface and ground water appropriations. The landowner would need to confirm a change in a development using water on land where he has an interest.

Section 4

Existing law provides for the admeasuring and distributing of water, including permitted water rights, by a water commissioner. All water rights, whether judicially decreed or administratively permitted, are subject to a water commissioner's control and distribution. The proposed language clarifies that permitted water rights are subject to a water commissioner's responsibility on decreed sources

EXHIBIT 4
2-1-89
399

to require suitable headgates. Currently the argument could be made that the water commissioner has no authority to require a permittee to have a measuring device where water is being diverted from a source. This amendment would clarify that a measuring device (headgate) would be necessary for a permittee to withdraw water from a source on which a water commissioner has been appointed by the court.

An example would be when a water user with a permit is diverting water on a decreed stream without the benefit of a headgate. The rate of his diversion cannot be determined by the water commissioner, and thus the commissioner has no effective control on the water user. The user would be clearly subject to the distribution authority of the water commissioner if this amendment is made.

VISITORS' REGISTER

Natural Resource COMMITTEE

BILL NO. HB 399 DATE 2-1-89

SPONSOR Rep O'Keefe

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Marvin Barber	H.P.A.		HB399 X
GEORGE OCHENSKI	A M W		
Stan Bradshaw	Trout Unlimited		
Jack Salvord	WETA		X
Carol Mosher	Mt. Cattle Women Mt. Stockgrowers		X
Lorna Frank	Farm Bureau		X
Jim Jensen	MECC	✓	
[illegible]	MSGA	✓	
Dave Darby	DNRC	X	
R H ENNIS	HVID	X	
Don McGettigan	DNRC	X	
Kim Enkerud	State Grazing Dist.		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 6, 1989, at 3:30 p.m.

ROLL CALL

Members Present: All

Members Excused: None

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: None

HEARING ON HB 486

Presentation and Opening Statement by Sponsor:

REP. GRADY, House District 47, said that contaminated groundwater from leaking landfills had been a persistent problem and the clean up had proven to be expensive and time consuming. He said the potential hazardous nature of solid waste landfills called for the implementation of systems that would monitor the extent of groundwater contamination caused by leakage.

REP. GRADY said the purpose of HB 486 was to establish appropriate guidelines for groundwater monitoring at municipal landfills serving populations of 5,000 or more. The Department of Health and Environmental Sciences (DHES) would establish a priority compliance list identifying sites that posed the greatest risk considering their proximity to drinking water supply, their hydrological and geographical characteristics, and age of the design of the site. This site specific information would be provided by the operator. The department would also require owners and operators of high priority sites to submit proposed plans to the department for accomplishing groundwater monitoring by January 1, 1991. All other sites must comply by January 1, 1992.

REP. GRADY then continued, reading most of the text of HB 486. He distributed EXHIBIT 1, a list of the landfill sites that

REP. OWENS concurred with the statement of Rep. Gilbert.

REP. RANEY noted that a section in the Statement of Intent had to be replaced with 85-1-615, a technical amendment.

REP. GIACOMETTO moved the amendment, and the motion CARRIED.

The motion on the bill, DO PASS AS AMENDED, CARRIED, with one dissenting vote from Rep. Hannah.

DISPOSITION OF HB 399

Hearing 2/01/89

Motion: REP. O'KEEFE moved the bill DO PASS.

Discussion: REP. O'KEEFE said the bill was essentially a Water Rights clean-up bill, and said it addressed four different topics: possessory interest in the area where the water was going to be used; criteria for the issuance of the permit; the creation of a three year trial period for changes in an appropriation right; and the requirement that adequate diversion structures are installed and that measuring take place at that point.

REP. O'KEEFE clarified that his reference to the Iverson bill, and suggestion that this bill be held for that was made in error.

REP. HARPER brought up Carol Mosher's concern regarding the language "at the proposed point of diversion". He said the committee should look at this concern because it could adversely effect the senior water right holders.

REP. O'KEEFE replied that the answer to that was the other "shalls". He particularly mentioned "shall no. 2", which says "in the amount the applicant seeks to appropriate", which falls under "there are unappropriated waters in the source of the supply." He said he understood Ms. Mosher's concern. But that should be covered by the other "shalls" that are protecting that prior right.

REP. HARPER said that in order to validify a water right, the water had to be put to a beneficial use. If it was unavailable to an individual at the source of diversion, he could not effectuate a water right. He commented that what Rep. O'Keefe was saying was right, but commented that there could be a better way. REP. RANEY reminded Rep. O'Keefe that before the department did what the bill was stating, the user requesting the water had to prove that the water rights of the prior appropriator would not be adversely affected. REP. O'KEEFE added that the way that the department did that was by notifying senior water rights holders and publishing it in the paper. If the senior water

rights holder did not object, the permit or change would be approved. In that case, it was the burden for the water rights holder to object to a new appropriation. He said the department would have to send out a lot fewer letters by telling the applicant that there was no water at the proposed point of diversion.

REP. ROTH asked if there was certain amount of water that was left after appropriations for stream flow. REP. O'KEEFE said no, except for some instances where there were instream flow reserves under the 1982 Yellowstone reservations or the instream water rights on eleven blue ribbon trout streams under the 1969 Murphy's law. He added that anyone who had rights senior to those dates on those streams could take their water even if it dried up the stream.

REP. ROTH asked who represented the stream. REP. O'KEEFE said DNRC did represent the stream until Rep. Westlake's bill was passed that day. DNRC had the provision to confront an individual with adversely affecting water rights in a stream. With Westlake's bill, DNRC would no longer be able to do that. He said that DNRC did not deal with fish and wildlife considerations in streams; DFWP did. He said that this bill had nothing to do with instream flow requirements.

REP. HARPER asked again how to address the concerns expressed by Carol Mosher. He said that even under the scenario of Rep. O'Keefe, it was possible that a person could get an easement across his neighbor's land, put a pipe downstream to where the next tributary came in, pump the water back up, and file the water right.

REP. O'KEEFE said that since 1983, people do not have "water rights"; they have "water use permits". He said that if people were to go downstream, bring the water back up the drainage and use it on their land, they would have a valid water use permit providing they were not adversely affecting anyone below the diversion point. He said it was not illegal to use hydroelectricity to pump water back upstream to irrigate. He said what Carol Mosher was explaining was stealing water from senior water users above them. He said this bill was trying to do away with the department having to issue a permit in those situations where people can think that they are doing that legally because there was unappropriated water in the source of supply.

REP. HARPER commented that senior water rights holders, through their paid lobbyist, were saying that this bill was a danger to them. He said he thought the bill offered them more protection but their lobbyist did not agree. He said he was concerned about passing this without thinking it through.

REP. KADAS commented that if the committee thought it should be in the bill, it was up to the other side to make their case on the floor and take it out.

Amendments, Discussion, and Votes: REP. RANEY asked the researcher to clarify the technical amendment to the committee. REP. ADDY moved the amendment, and the motion CARRIED.

Recommendation and Vote: REP. ADDY moved the bill DO PASS AS AMENDED. The motion CARRIED unanimously.

ADJOURNMENT

Adjournment At: 6:05 p.m.

Bob Raney
REP. BOB RANEY, Chairperson

BR/cm

3112.min

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

51th LEGISLATIVE SESSION -- 1989

Date 2-6-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman	✓		
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah	✓		
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

CS-30

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 15, 1989, at 2:55 p.m.

ROLL CALL

Members Present: All members except:

Members Excused: Rep. Cohen

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: REP. GILBERT distributed the booklet, House Joint Resolution 49, Forest Practices and Watershed Effects, Final Report by the Environmental Quality Council, for the committee to review in preparation for their consideration of HB 678.

HUGH ZACKHEIM discussed HB 552, the tank licensing bill, which, being a revenue bill, would not have to meet transmittal. MR. ZACKHEIM said that because HB 552 creates a new licensing board, the committee would normally be restricted in passing the bill out until the Legislative Audit Committee heard the bill. In anticipation of this event, DHES drafted a bill which specifically exempted this bill from review by the Audit Committee. Once that bill was signed by the Governor, this committee could act on HB 552.

REP. RANEY brought up HB 498, which had been tabled 2-6-89. REP. GILBERT said that he had spoken with Rep. Grady and the well drillers, and the consensus was that an ID number on tags affixed to the well would be acceptable. MR. ZACKHEIM said that he had looked at the letter from the water well drillers, as directed by the committee. He said that if there was interest on the part of the committee, an amended bill could be developed. REP. HARPER said that he had talked to another well driller, and that he thought the owner should affix the ID tag. The committee decided not to make any additional motions on the bill and it remained tabled.

DISPOSITION OF HB 399

Hearing 2/01/89
Executive Action 2/06/89 and 2/13/89

Motion: REP. O'KEEFE moved to RECONSIDER HB 399.

Discussion: REP. O'KEEFE stated that the amendments had been passed in previous executive action (Monday, 2-13-89, EXHIBIT 2), and that subsequently there was a language problem discovered with the use of the words "changes" and "permits". A motion to reconsider put the bill back into committee so that the language could be changed to be consistent. The motion to reconsider CARRIED unanimously.

Amendments, Discussion, and Votes: REP. O'KEEFE moved the amendments. REP. ROTH asked if the amendments had been shown to the cattlemen, and REP. HARPER said that these were the amendments that had been voted on previously. The motion on the amendments CARRIED unanimously.

Recommendation and Vote: REP. O'KEEFE moved DO PASS AS AMENDED and the motion CARRIED unanimously.

HEARING ON HJR 25

Presentation and Opening Statement by Sponsor:

REP. BROWN, District 72, Butte-Silver Bow, introduced the resolution and stated that it attempted to accomplish several things. It would support the position protecting Montana's coal interests taken by the Montana Congressional Delegation on the resolution to the acid rain problem. It would emphasize the MHD technology as well as the possible retrofit of the Corrette plant in Billings. This would be a near $400,000,000 project that would be the first near commercial test of the MHD technology, and would be under the National Clean Coal Technology program, which this resolution also supported. The resolution directed all of this activity to the attention of the Montana Congressional Delegation and the new governor.

REP. BROWN stated that Mr. John North, of the MERDI Corporation, Butte, and Mr. Bob Labrie, MHD Development Corporation, were in support of this resolution, but were unable to attend the hearing.

Testifying Proponents and Who They Represent:

Gerry Funk, Vice President, MSE Inc., Butte
Ken Williams, Entech, Butte
Jim Jensen, Montana Environmental Information Center (MEIC)

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

51th LEGISLATIVE SESSION -- 1989

Date 2-15-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman			✓
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah	✓		
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

STANDING COMMITTEE REPORT

February 15, 1989

Mr. Speaker: We, the committee on Natural Resources report that HOUSE BILL 399 (first reading copy -- white) do pass as amended .

Signed: _____
Bob Raney, Chairman

And, that such amendments read:

1. Page 10.
Following: line 3
Insert: "(3) (a) If the department approves an application for a trial change in appropriation right under subsection (2):

(i) the appropriator shall allow access by the department throughout the trial period to the site where the change is being implemented;

(ii) the department shall inspect the site upon the request of any person holding a valid water right in the source of supply; and

(iii) any water user may, throughout the trial period, petition the department to terminate the trial change and deny the application for a change in appropriation right because water users are experiencing actual adverse effects of the trial change. The department shall investigate the allegations contained in a petition and, if it determines that there are adverse effects, the trial period must be terminated and the application for change in appropriation right must be denied unless the applicant can establish by clear and convincing evidence that the adverse effects are caused by unique climatological events or other unforeseen circumstances that will not reoccur throughout the remainder of the trial period.

(b) If the application for change in appropriation right is denied during or after the trial period, the department shall require the appropriator to remove the diversion structures or facilities that implemented the trial change."
Renumber: subsequent subsections

2. Page 10, line 4.
Strike: "(4)"
Insert: "(5)"

3. Page 10, line 5.
Strike: "(6)"
Insert: "(7)"

4. Page 10, line 25.
Strike: "(3)"
Insert: "(4)"

5. Page 12, line 2.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

6. Page 13, line 1.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

7. Page 13, line 9.
Strike: "(6)(b)(ii)"
Insert: "(7)(b)(ii)"

8. Page 13, line 10.
Strike: "(6)(b)(iii)"
Insert: "(7)(b)(iii)"

9. Page 15, line 24.
Strike: "is"
Insert: "are"

EXHIBIT 2
DATE 2-15-89
HB 399

Amendments to House Bill No. 399
Introduced (White) Copy

Requested by Rep. Harper
For the House Committee on Natural Resources

Prepared by H. Zackheim
February 15, 1989

1. Page 10.
Following: line 3
Insert: "(3) (a) If the department approves an application for a trial change in appropriation right under subsection (2):

(i) the appropriator shall allow access by the department throughout the trial period to the site where the change is being implemented;

(ii) the department shall inspect the site upon the request of any person holding a valid water right in the source of supply; and

(iii) any water user may, throughout the trial period, petition the department to terminate the trial change and deny the application for a change in appropriation right because water users are experiencing actual adverse effects of the trial change. The department shall investigate the allegations contained in a petition and, if it determines that there are adverse effects, the trial period must be terminated and the application for change in appropriation right must be denied unless the applicant can establish by clear and convincing evidence that the adverse effects are caused by unique climatological events or other unforeseen circumstances that will not reoccur throughout the remainder of the trial period.

(b) If the application for change in appropriation right is denied during or after the trial period, the department shall require the appropriator to remove the diversion structures or facilities that implemented the trial change."
Renumber: subsequent subsections

2. Page 10, line 4.
Strike: "(4)"
Insert: "(5)"

3. Page 10, line 5.
Strike: "(6)"
Insert: "(7)"

4. Page 10, line 25.
Strike: "(3)"
Insert: "(4)"

5. Page 12, line 2.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

6. Page 13, line 1.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

7. Page 13, line 9.
Strike: "(6)(b)(ii)"
Insert: "(7)(b)(ii)"

8. Page 13, line 10.
Strike: "(6)(b)(iii)"
Insert: "(7)(b)(iii)"

9. Page 15, line 24.
Strike: "is"
Insert: "are"

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 13, 1989, at 3:00 p.m.

ROLL CALL

Members Present: All members present except:

Members Excused: Rep. Cohen

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: None

HEARING ON HB 608

Presentation and Opening Statement by Sponsor:

REP. TIM WHALEN, House District 93, presented HB 608, a bill which would require industries in Montana that emit more than a thousand tons of sulfur dioxide annually to either have in-stack monitors, commonly known as continuous emission monitors or CEM's, or to install equipment or a process to enable them to clean up these emissions to the latest standards available in the industry. He said that with Rep. Hannah's legislation passed last session to relax the state standard in Yellowstone County, the monitors placed in Yellowstone County from Rep. Addy's bill and the formation of BLAQTC (Billing Laurel Air Quality Technical Committee), difficulties had developed in producing data that was relevant. He said that in essence, a license to emit more sulfur dioxide, especially in Billings, had been created.

REP. WHALEN said that HB 608 had arisen in response to these difficulties, and that members of the Yellowstone Valley Citizens Council, a group that had been following the issue for the past two years, were present to testify. He also said that Wayne Mahan, Chief Development Engineer at Cenex, would be available as a resource person on the economics of stack scrubbing.

Testifying Proponents and Who They Represent:

amendment might give the bill a chance in the Senate. He said he would rather have some bill with limits to raise the awareness level than have no bill at all.

REP. BROOKE asked for the amendment to be repeated, and REP. HARPER repeated the amendment with some additional words: "unless site specific information indicates otherwise, the department may not require monitoring wells if the groundwater level is greater than 100 feet from the lowest level of waste, and may not require more than 4 monitoring wells."

The motion CARRIED, with Rep. Clark, Rep. Cohen, Rep. Raney and Rep. Gilbert voting no.

REP. RANEY said the department recommended an effective date of October 1 in order to give the impacted individuals some lead time. He offered an amendment to make an effective date of October 1, 1989.

REP. HARPER moved the amendment. The motion CARRIED.

Recommendation and Vote: REP. O'KEEFE moved the bill DO PASS AS AMENDED. The motion CARRIED on a roll call vote 12 to 4.

DISPOSITION OF HB 413

Motion: REP. GIACOMETTO moved the bill DO PASS.

Discussion: None

Amendments, Discussion, and Votes: REP. HARPER moved the amendments. He referred to the amendments in EXHIBIT 19. He offered one change to the amendments, involving the moving of the word "both" so that it would follow the word "by". He said Rep. Westlake endorsed the amendments, and the subcommittee was unanimous in its support of the amendments. REP. HARPER explained that with the amendments, the bill allowed the Department of Natural Resources and Conservation, together with one valid right holder, to petition the District Court to appoint a water commissioner. The motion CARRIED unanimously.

Recommendation and Vote: REP. GIACOMETTO moved the bill DO PASS AS AMENDED. The motion CARRIED unanimously.

DISPOSITION OF HB 399

Hearing 2/01/89
Executive Action 2/06/89

Motion: REP. O'KEEFE moved to RECONSIDER HB 399.

Vote: The motion CARRIED unanimously.

Motion: REP. HARPER moved the bill.

Discussion: None

Amendments, Discussion, and Votes: REP. HARPER moved amendments on EXHIBIT 19, 2 through 10. He said that amendment 1 on that exhibit died in subcommittee on a 2 to 1 vote, and was therefore not under consideration. He said the next amendment would remain with the change in sub (iii) that would add ", or other events beyond the applicant's control". He said there could be the collapse of a ditch or other events beyond the control of the person applying for the permit.

REP. GIACOMETTO commented that individuals who had problems with this section before were satisfied with this new amendment. REP. HARPER clarified that individuals were comfortable with the bill as amended by 2 through 10. REP. RANEY commented that amendments 3 through 10 allowed amendment 2 to be put into the bill.

REP. O'KEEFE said the intent of the amendments, was to tighten up the "shalls" of the department in such a way that the existing permit system was not shut down. He said his concern with amendment 1 was that, while it would protect the senior water right holders, it would result in shutting the door on the issuance of new water rights due to the prohibitive expense. The bill would become essentially an instream flow bill with that amendment, which was not the intent. He said the intent was to tighten up the system, while giving the senior water right users as much protection as possible. He said amendment 2 set up a new procedure in DNRC as far as trial changes went. If the department determined that there was adverse effect, the department could require the appropriator to remove it.

REP. HARPER further clarified amendment 2, saying it arose out of concern for senior water right holders that once the three year trial period was over, the diversion structure or facility could still be removed if it produced an adverse effect.

REP. HANNAH asked if there was any retroactivity in this provision. REP. O'KEEFE said there was no retroactive provision.

The motion on the amendments 2 through 10, EXHIBIT 19, CARRIED unanimously.

Recommendation and Vote: REP. BROOKE moved the bill DO PASS AS AMENDED, and the motion CARRIED unanimously.

DISPOSITION OF HJR 9

Hearing 2/10/89

Motion: REP. GIACOMETTO moved the bill DO PASS.

Discussion: None

Amendments, Discussion, and Votes: REP. BROOKE moved the amendments as presented in the gray bill, and said it met the approval of the sponsor. The motion on the amendments CARRIED unanimously.

Recommendation and Vote: REP. GIACOMETTO moved the bill DO PASS AS AMENDED. The motion CARRIED with Rep. Gilbert and Rep. Owens voting no.

DISPOSITION OF HB 399

Hearing 2/01/89
Executive Action 2/06/89, 2/13/89

Motion: REP. HARPER moved that the committee RECONSIDER HB 399.

Discussion: REP. HARPER said the committee had failed to amend a section of the bill.

Amendments, Discussion, and Votes: None

Recommendation and Vote: The motion to reconsider CARRIED unanimously. Further executive action would continue at a later date.

ADJOURNMENT

Adjournment At: 6:20 p.m.

Bob Raney
REP. RANEY, Chairperson

BR/cm

3712.min

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

51th LEGISLATIVE SESSION -- 1989

Date 2/13/89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman			✓
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah	✓		
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

EXHIBIT 19
DATE 2-13-89
HB 399

Amendments to House Bill No. 399
Introduced (White) Copy

Requested by Rep. Harper
For the House Committee on Natural Resources

Prepared by H. Zackheim
February 10, 1989

1. Page 5, line 8.
Following: "diversion"
Insert: "and at the points of diversion of all persons holding water rights with earlier priority dates within a subbasin provided for in 85-2-231"

2. Page 10.
Following: line 3
Insert: "(3) (a) If the department approves an application for a trial change under subsection (2):

(i) the appropriator shall allow access by the department throughout the trial period to the site where the change is being implemented;

(ii) the department shall inspect the site upon the request of any person holding a valid water right in the source of supply; and

(iii) any water user may, throughout the trial period, petition the department to deny the permit because water users are experiencing actual adverse effects of the trial permit. The department shall investigate all petitions and, if it determines that there are adverse effects, the trial permit must be denied unless the trial permittee can establish by clear and convincing evidence that the adverse effects are caused by unique climatological events then being experiences that will not reoccur througout the remainder of the trial period.

(b) If the application for change is denied after the trial period, the department shall require the appropriator to remove the diversion structures or facilities that implemented the trial change."
Renumber: subsequent subsections

3. Page 10, line 4.
Strike: "(4)"
Insert: "(5)"

4. Page 10, line 5.
Strike: "(6)"
Insert: "(7)"

5. Page 10, line 25.
Strike: "(3)"
Insert: "(4)"

6. Page 12, line 2.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

7. Page 13, line 1.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

8. Page 13, line 9.
Strike: "(6)(b)(ii)"
Insert: "(7)(b)(ii)"

9. Page 13, line 10.
Strike: "(6)(b)(iii)"
Insert: "(7)(b)(iii)"

10. Page 15, line 24.
Strike: "is"
Insert: "are"

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairperson Bob Raney, on February 15, 1989, at 2:55 p.m.

ROLL CALL

Members Present: All members except:

Members Excused: Rep. Cohen

Members Absent: None

Staff Present: Claudia Montagne, Secretary; Hugh Zackheim, Staff Researcher, Environmental Quality Council

Announcements/Discussion: REP. GILBERT distributed the booklet, House Joint Resolution 49, Forest Practices and Watershed Effects, Final Report by the Environmental Quality Council, for the committee to review in preparation for their consideration of HB 678.

HUGH ZACKHEIM discussed HB 552, the tank licensing bill, which, being a revenue bill, would not have to meet transmittal. MR. ZACKHEIM said that because HB 552 creates a new licensing board, the committee would normally be restricted in passing the bill out until the Legislative Audit Committee heard the bill. In anticipation of this event, DHES drafted a bill which specifically exempted this bill from review by the Audit Committee. Once that bill was signed by the Governor, this committee could act on HB 552.

REP. RANEY brought up HB 498, which had been tabled 2-6-89. REP. GILBERT said that he had spoken with Rep. Grady and the well drillers, and the consensus was that an ID number on tags affixed to the well would be acceptable. MR. ZACKHEIM said that he had looked at the letter from the water well drillers, as directed by the committee. He said that if there was interest on the part of the committee, an amended bill could be developed. REP. HARPER said that he had talked to another well driller, and that he thought the owner should affix the ID tag. The committee decided not to make any additional motions on the bill and it remained tabled.

DISPOSITION OF HB 399

Hearing 2/01/89
Executive Action 2/06/89 and 2/13/89

Motion: REP. O'KEEFE moved to RECONSIDER HB 399.

Discussion: REP. O'KEEFE stated that the amendments had been passed in previous executive action (Monday, 2-13-89, EXHIBIT 2), and that subsequently there was a language problem discovered with the use of the words "changes" and "permits". A motion to reconsider put the bill back into committee so that the language could be changed to be consistent. The motion to reconsider CARRIED unanimously.

Amendments, Discussion, and Votes: REP. O'KEEFE moved the amendments. REP. ROTH asked if the amendments had been shown to the cattlemen, and REP. HARPER said that these were the amendments that had been voted on previously. The motion on the amendments CARRIED unanimously.

Recommendation and Vote: REP. O'KEEFE moved DO PASS AS AMENDED and the motion CARRIED unanimously.

HEARING ON HJR 25

Presentation and Opening Statement by Sponsor:

REP. BROWN, District 72, Butte-Silver Bow, introduced the resolution and stated that it attempted to accomplish several things. It would support the position protecting Montana's coal interests taken by the Montana Congressional Delegation on the resolution to the acid rain problem. It would emphasize the MHD technology as well as the possible retrofit of the Corrette plant in Billings. This would be a near $400,000,000 project that would be the first near commercial test of the MHD technology, and would be under the National Clean Coal Technology program, which this resolution also supported. The resolution directed all of this activity to the attention of the Montana Congressional Delegation and the new governor.

REP. BROWN stated that Mr. John North, of the MERDI Corporation, Butte, and Mr. Bob Labrie, MHD Development Corporation, were in support of this resolution, but were unable to attend the hearing.

Testifying Proponents and Who They Represent:

Gerry Funk, Vice President, MSE Inc., Butte
Ken Williams, Entech, Butte
Jim Jensen, Montana Environmental Information Center (MEIC)

DAILY ROLL CALL

HOUSE NATURAL RESOURCES COMMITTEE

50th LEGISLATIVE SESSION -- 1989

Date 2-15-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Raney, Chairman	✓		
Rep. Ben Cohen, Vice-Chairman			✓
Rep. Kelly Addy	✓		
Rep. Vivian Brooke	✓		
Rep. Hal Harper	✓		
Rep. Mike Kadas	✓		
Rep. Mary McDonough	✓		
Rep. Janet Moore	✓		
Rep. Mark O'Keefe	✓		
Rep. Robert Clark	✓		
Rep. Leo Giacometto	✓		
Rep. Bob Gilbert	✓		
Rep. Tom Hannah	✓		
Rep. Lum Owens	✓		
Rep. Rande Roth	✓		
Rep. Clyde Smith	✓		

STANDING COMMITTEE REPORT

February 15, 1989

Mr. Speaker: We, the committee on Natural Resources report that HOUSE BILL 399 (first reading copy -- white) do pass as amended .

Signed: _____
Bob Raney, Chairman

And, that such amendments read:

1. Page 10.
Following: line 3
Insert: "(3) (a) If the department approves an application for a trial change in appropriation right under subsection (2):

(i) the appropriator shall allow access by the department throughout the trial period to the site where the change is being implemented;

(ii) the department shall inspect the site upon the request of any person holding a valid water right in the source of supply; and

(iii) any water user may, throughout the trial period, petition the department to terminate the trial change and deny the application for a change in appropriation right because water users are experiencing actual adverse effects of the trial change. The department shall investigate the allegations contained in a petition and, if it determines that there are adverse effects, the trial period must be terminated and the application for change in appropriation right must be denied unless the applicant can establish by clear and convincing evidence that the adverse effects are caused by unique climatological events or other unforeseen circumstances that will not reoccur throughout the remainder of the trial period.

(b) If the application for change in appropriation right is denied during or after the trial period, the department shall require the appropriator to remove the diversion structures or facilities that implemented the trial change."
Renumber: subsequent subsections

2. Page 10, line 4.
Strike: "(4)"
Insert: "(5)"

3. Page 10, line 5.
Strike: "(6)"
Insert: "(7)"

4. Page 10, line 25.
Strike: "(3)"
Insert: "(4)"

5. Page 12, line 2.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

6. Page 13, line 1.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

7. Page 13, line 9.
Strike: "(6)(b)(ii)"
Insert: "(7)(b)(ii)"

8. Page 13, line 10.
Strike: "(6)(b)(iii)"
Insert: "(7)(b)(iii)"

9. Page 15, line 24.
Strike: "is"
Insert: "are"

EXHIBIT 2
DATE 2-15-89
HB 399

Amendments to House Bill No. 399
Introduced (White) Copy

Requested by Rep. Harper
For the House Committee on Natural Resources

Prepared by H. Zackheim
February 15, 1989

1. Page 10.
Following: line 3
Insert: "(3) (a) If the department approves an application for a trial change in appropriation right under subsection (2):

(i) the appropriator shall allow access by the department throughout the trial period to the site where the change is being implemented;

(ii) the department shall inspect the site upon the request of any person holding a valid water right in the source of supply; and

(iii) any water user may, throughout the trial period, petition the department to terminate the trial change and deny the application for a change in appropriation right because water users are experiencing actual adverse effects of the trial change. The department shall investigate the allegations contained in a petition and, if it determines that there are adverse effects, the trial period must be terminated and the application for change in appropriation right must be denied unless the applicant can establish by clear and convincing evidence that the adverse effects are caused by unique climatological events or other unforeseen circumstances that will not reoccur throughout the remainder of the trial period.

(b) If the application for change in appropriation right is denied during or after the trial period, the department shall require the appropriator to remove the diversion structures or facilities that implemented the trial change."
Renumber: subsequent subsections

2. Page 10, line 4.
Strike: "(4)"
Insert: "(5)"

3. Page 10, line 5.
Strike: "(6)"
Insert: "(7)"

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Insert: "(4)"

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Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

6. Page 13, line 1.
Strike: "(3)"
Insert: "(4)"
Strike: "(4)"
Insert: "(5)"

7. Page 13, line 9.
Strike: "(6)(b)(ii)"
Insert: "(7)(b)(ii)"

8. Page 13, line 10.
Strike: "(6)(b)(iii)"
Insert: "(7)(b)(iii)"

9. Page 15, line 24.
Strike: "is"
Insert: "are"

14. Page 4, line 20.
Following: "developing"
Insert: "or having developed"

15. Page 5, line 14.
Following: line 14
Insert: "NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval."

And, as amended, do pass. Report adopted.

HB 729, do pass. Report adopted.

MESSAGES FROM THE SENATE

Senate bills passed and transmitted to the House for concurrence: 2/18/89

SB 124, introduced by Hager
SB 166, introduced by Bengtson
SB 167, introduced by Bengtson
SB 169, introduced by Bengtson
SB 253, introduced by Hofman
SB 257, introduced by Rapp-Svrcek
SB 259, introduced by Williams
SB 266, introduced by Walker
SB 340, introduced by Williams
SB 391, introduced by Bishop
SJR 6, introduced by Rapp-Svrcek

MESSAGES FROM THE GOVERNOR

February 18, 1989

John Vincent
Speaker of the House
Montana House of Representatives
State Capitol
Helena, Montana 59620

Dear Representative Vincent:

Please be informed that I have signed House Bill 19 on February 18, 1989.

Sincerely,

STAN STEPHENS
Governor

February 17, 1989

The Honorable John Vincent
Speaker of the House
State Capitol
Helena, Montana 59620

The Honorable Jack Galt
President of the Senate
State Capitol
Helena, Montana 59620

Dear Representative Vincent and Senator Galt:

In accordance with the power vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby return House Bill 29, "AN ACT TO CLARIFY THE FUNCTIONS OF THE COUNTY ASSESSOR IN IDENTIFYING TAXPAYERS SUBJECT TO A TELEVISION DISTRICT TAX; TO PROVIDE A DEADLINE FOR CLAIMING AN EXEMPTION; AMENDING SECTIONS 7-13-2527 THROUGH 7-13-2529, MCA; AND PROVIDING AN APPLICABILITY DATE."

The bill contains a major technical problem. Section 1 requires assessors to report the owners of all property contained in classes four (most residential and commercial structures) and twelve (mobile homes) to the board of the television district. However, television districts typically service rural residents whose residential property is contained in class fourteen (farmsteads). This omission, if not corrected, would have a serious impact on some districts.

Governor's Amendments to HB 29

1. Page 1, line 18.
Strike: "class four or class twelve"
Insert: "class four, class twelve or class fourteen"

Sincerely,

STAN STEPHENS
Governor

Representative Harper moved the House recess until 1:15 p.m.

Motion carried.

House recessed at 11:45 p.m.

House reconvened at 1:15 p.m. Mr. Speaker in the Chair.

SECOND READING OF BILLS (COMMITTEE OF THE WHOLE)

Representative Harper moved the House resolve itself into a Committee of the Whole for the consideration of business on second reading. Motion carried. Representative Marks in the Chair.

Mr. Speaker: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

Representatives D. Brown, J. Brown, Darko, Good, Gould, Guthrie, Hansen, Hoffman, Johnson, McDonough, Rehberg, Stickney, Wallin, and Wyatt excused at this time.

HB 571 - Without objection, HB 571 was moved below HB 605 on the second reading board.

HB 399 - Representative Thoft moved HB 399, second reading copy, be amended as follows:

1. Title, line 15.
Following: "EFFECTIVE DATE"
Strike: "AND A RETROACTIVE APPLICABILITY DATE"

2. Page 18, line 1.
Strike: section 6 in its entirety
Renumber: subsequent section

Amendment passed as follows:

Ayes: Aafedt, Addy, Bardanouve, Blotkamp, Boharski, Bradley, Brooke, Campbell, Clark, Cobb, Cocchiarella, Cody, Cohen, Compton, Connelly, Daily, Davis, DeBruycker, DeMars, Driscoll, Elliott, Ellison, Eudaily,

Iverson, Johnson, Kadas, Kasten, Keller, Kilpatrick, Kimberley, Knapp, Koehnke, Lee, Marks, McCormick, McDonough, Menahan, Mercer, Moore, L. Nelson, R. Nelson, T. Nelson, Nisbet, O'Connell, O'Keefe, Owens, Pavlovich, Peterson, Phillips, Quilici, Raney, Ream, Rehberg, Rice, Roth, Russell, Schye, Simon, Simpkins, Smith, Spaeth, Spring, Squires, Stickney, Swift, Thomas, Wallin, Westlake, Whalen, Wyatt, Mr. Speaker.
Total 87

Noes: Campbell, Cobb, Good, Guthrie, Peck, Stang, Steppler.
Total 7

Excused: Strizich, Swysgood, Thoft, Zook.
Total 4

Absent or not voting: Patterson, Ramirez.
Total 2

HB 393 passed as follows:

Ayes: Aafedt, Addy, Bachini, Bardanouve, Blotkamp, Brooke, J. Brown, Clark, Cobb, Cocchiarella, Cohen, Compton, Connelly, Darko, Davis, DeBruycker, Driscoll, Elliott, Ellison, Eudaily, Gervais, Gilbert, Good, Gould, Grady, Hannah, Hansen, Harper, Hayne, Hoffman, Johnson, Kadas, Kasten, Keller, Kilpatrick, Kimberley, Knapp, Koehnke, Lee, Marks, McCormick, Menahan, Mercer, Moore, L. Nelson, R. Nelson, T. Nelson, Nisbet, O'Connell, Owens, Peck, Peterson, Quilici, Ramirez, Ream, Rehberg, Rice, Roth, Simon, Simpkins, Spaeth, Spring, Stickney, Swift, Thomas, Wallin, Wyatt, Mr. Speaker.
Total 68

Noes: Bradley, D. Brown, Campbell, Cody, Daily, DeMars, Giacometto, Glaser, Grinde, Guthrie, Hanson, Harrington, Iverson, McDonough, O'Keefe, Patterson, Pavlovich, Phillips, Raney, Russell, Schye, Smith, Squires, Stang, Steppler, Westlake, Whalen, Zook.
Total 28

Excused: Strizich, Swysgood, Thoft.
Total 3

Absent or not voting: Boharski.
Total 1

HB 399 passed as follows:

Ayes: Aafedt, Addy, Bachini, Bardanouve, Blotkamp, Boharski, Bradley, Brooke, D. Brown, J. Brown, Campbell, Clark, Cobb, Cocchiarella, Cody, Cohen, Compton, Connelly, Daily, Darko, Davis, DeBruycker, DeMars, Driscoll, Elliott, Ellison, Eudaily, Gervais, Giacometto, Gilbert, Glaser, Good, Gould, Grady, Grinde, Guthrie, Hannah, Hansen, Hanson, Harper, Harrington, Hayne, Hoffman, Iverson, Johnson, Kadas, Kasten, Keller, Kilpatrick, Kimberley, Knapp, Koehnke, Lee, Marks, McCormick, McDonough, Menahan, Mercer, Moore, L. Nelson, R. Nelson, T. Nelson, Nisbet, O'Connell, O'Keefe, Owens, Patterson, Pavlovich, Peck, Peterson, Phillips, Quilici, Ramirez, Raney, Ream, Rehberg, Rice, Roth, Russell, Schye, Simon, Simpkins, Smith, Spaeth, Spring, Squires, Stang, Steppler, Stickney, Swift, Thomas, Wallin, Westlake, Whalen, Wyatt, Zook, Mr. Speaker.
Total 97

Noes: None.
Total 0

Excused: Strizich, Swysgood, Thoft.
Total 3

Absent or not voting: None.
Total 0

HB 422 passed as follows:

Ayes: Aafedt, Addy, Bardanouve, Blotkamp, Boharski, Bradley, Brooke, D. Brown, J. Brown, Campbell, Clark, Cobb, Cocchiarella, Cody, Cohen, Compton, Connelly, Daily, Davis, DeBruycker, DeMars, Driscoll, Elliott, Ellison, Eudaily, Gervais, Giacometto, Gilbert, Glaser, Gould, Grady, Grinde, Guthrie, Hannah, Hansen, Harper, Harrington, Hayne, Hoffman, Iverson, Johnson, Kadas, Keller, Kilpatrick, Kimberley, Knapp, Marks, McCormick, McDonough, Menahan, Mercer, Moore, L. Nelson, R. Nelson, T. Nelson, Nisbet, O'Connell, O'Keefe, Owens, Pavlovich, Peterson, Phillips, Quilici, Ramirez, Raney, Ream, Rehberg, Rice, Roth, Russell, Schye, Simon, Simpkins, Smith, Spaeth, Spring, Squires, Stang, Steppler, Stickney, Swift, Thomas, Westlake, Whalen, Wyatt, Zook, Mr. Speaker.
Total 87

Noes: Bachini, Koehnke, Lee, Patterson, Peck, Wallin.
Total 6

Excused: Strizich, Swysgood, Thoft.
Total 3

Absent or not voting: Darko, Good, Hanson, Kasten.
Total 4

HB 437 passed as follows:

Ayes: Aafedt, Addy, Bachini, Bardanouve, Blotkamp, Boharski, Bradley, Brooke, D. Brown, J. Brown, Campbell, Clark, Cobb, Cocchiarella, Cody, Cohen, Compton, Connelly, Daily, Darko, Davis, DeBruycker, DeMars, Driscoll, Elliott, Ellison, Eudaily, Gervais, Giacometto, Gilbert, Glaser, Good, Gould, Grady, Grinde, Guthrie, Hannah, Hansen, Hanson, Harper, Harrington, Hayne, Hoffman, Iverson, Johnson, Kadas, Kasten, Keller, Kilpatrick, Kimberley, Knapp, Koehnke, Lee, Marks, McCormick, McDonough, Menahan, Mercer, Moore, L. Nelson, R. Nelson, T. Nelson, Nisbet, O'Connell, O'Keefe, Owens, Patterson, Pavlovich, Peck, Peterson, Phillips, Quilici, Ramirez, Raney, Ream, Rehberg, Rice, Roth, Russell, Schye, Simon, Simpkins, Smith, Spaeth, Spring, Squires, Stang, Steppler, Stickney, Swift, Thomas, Wallin, Westlake, Whalen, Wyatt, Zook, Mr. Speaker.
Total 97

Noes: None.
Total 0

Excused: Strizich, Swysgood, Thoft.
Total 3

Absent or not voting: None.
Total 0

HB 438 passed as follows:

Ayes: Aafedt, Addy, Bachini, Bardanouve, Blotkamp, Boharski, Bradley, Brooke, D. Brown, J. Brown, Campbell, Clark, Cobb, Cocchiarella, Cody, Cohen, Compton, Connelly, Daily, Darko, Davis, DeBruycker, DeMars, Driscoll, Elliott, Ellison, Eudaily, Gervais, Giacometto, Gilbert, Glaser,

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION; ~~PROVIDING--FOR--A--TRIAL--CHANGE--IN--APPROPRIATION---RIGHT;~~ CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311, 85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE ~~AND-A-RETROACTIVE-APPLICABILITY-DATE~~."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-306, MCA, is amended to read:

"**85-2-306. Exceptions to permit requirements.** (1) Groundwater may be appropriated only by a person who has ~~either~~ a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the groundwater development works or, if another person has rights in the groundwater development works, the written consent of the person with those property rights. Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date of refiling a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall

be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of the claim of existing water right. An appropriation under this subsection is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules

adopted by the board under 85-2-113."

Section 2. Section 85-2-311, MCA, is amended to read:

"**85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) ~~throughout~~ during the period ~~during~~ in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

impoundment, use, or restraint contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, use, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 3. Section 85-2-402, MCA, is amended to read:

"85-2-402. **Changes in appropriation rights.** (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

~~(2)--The--department,--after---providing---notice---and opportunity---for---hearing--pursuant--to--85-2-307--through 85-2-309,-may-approve-an-application-for-a-trial--change--in appropriation--right--for-a-period-not-to-exceed-3-years.-In approving--an--application--under---this---subsection,---the department-shall-find-from-the-available-evidence-that:~~

~~(a)--substantial-injury-to-any-appropriator-of-water-is unlikely--to-occur-but-that-the-precise-effect-of-the-change on-other-appropriators-is-difficult-to-determine-in--advance of-the-change;-and~~

~~(b)--the--requirements--of--subsections--(3)(b)-through (3)(d)-are-met-and-it-is-likely-that-the-other--requirements of-this-section-can-be-met.~~

~~(3)--(A)-IF--THE-DEPARTMENT-APPROVES-AN-APPLICATION-FOR A-TRIAL-CHANGE-IN-APPROPRIATION-RIGHT-UNDER-SUBSECTION--(2):~~

~~(I)--THE---APPROPRIATOR---SHALL--ALLOW--ACCESS--BY--THE DEPARTMENT-THROUGHOUT-THE-TRIAL-PERIOD-TO-THE-SITE-WHERE-THE CHANGE-IS-BEING-IMPLEMENTED;~~

~~(II)-THE-DEPARTMENT-SHALL-INSPECT--THE--SITE--UPON--THE REQUEST--OF--ANY--PERSON--HOLDING-A-VALID-WATER-RIGHT-IN-THE SOURCE-OF-SUPPLY;-AND~~

~~(III)-ANY-WATER-USER-MAY,-THROUGHOUT-THE-TRIAL--PERIOD, PETITION--THE--DEPARTMENT--TO-TERMINATE-THE-TRIAL-CHANGE-AND DENY-THE-APPLICATION-FOR-A--CHANGE--IN--APPROPRIATION--RIGHT BECAUSE--WATER-USERS-ARE-EXPERIENCING-ACTUAL-ADVERSE-EFFECTS OF-THE-TRIAL-CHANGE.--THE-DEPARTMENT-SHALL--INVESTIGATE--THE ALLEGATIONS--CONTAINED--IN--A-PETITION-AND,-IF-IT-DETERMINES THAT-THERE-ARE-ADVERSE-EFFECTS,-THE--TRIAL--PERIOD--MUST--BE TERMINATED--AND--THE-APPLICATION-FOR-CHANGE-IN-APPROPRIATION RIGHT-MUST-BE-DENIED-UNLESS-THE-APPLICANT-CAN--ESTABLISH--BY CLEAR--AND--CONVINCING-EVIDENCE-THAT-THE-ADVERSE-EFFECTS-ARE CAUSED-BY-UNIQUE-CLIMATOLOGICAL-EVENTS-OR--OTHER--UNFORESEEN CIRCUMSTANCES--THAT--WILL-NOT-RECUR-THROUGHOUT-THE-REMAINDER OF-THE-TRIAL-PERIOD.~~

~~(B)--IF-THE-APPLICATION--FOR--CHANGE--IN--APPROPRIATION~~

~~RIGHT--IS--DENIED--DURING--OR--AFTER--THE--TRIAL-PERIOD,-THE DEPARTMENT-SHALL-REQUIRE--THE--APPROPRIATOR--TO--REMOVE--THE DIVERSION--STRUCTURES--OR--FACILITIES--THAT--IMPLEMENTED-THE TRIAL-CHANGE.~~

~~(2)~~ ~~(3)~~ ~~(4)~~ (2) Except as provided in subsections ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) through ~~(5)~~ ~~(6)~~ ~~(7)~~ (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

~~(3)~~ ~~(4)~~ ~~(5)~~ (3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands ~~of~~ for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

~~(4)~~ ~~(5)~~ ~~(6)~~ (4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5

or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) and ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

~~(5)~~~~(6)~~~~(7)~~(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature

approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) or ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections ~~(5)(b)(ii)~~ ~~(6)(b)(ii)~~ ~~(7)(B)(ii)~~ (5)(B)(II) and ~~(5)(b)(iii)~~ ~~(6)(b)(iii)~~ ~~(7)(B)(iii)~~ (5)(B)(III) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in

the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

~~(6)~~ ~~(7)~~ ~~(8)~~ (6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

~~(7)~~ ~~(8)~~ ~~(9)~~ (7) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312~~(3)~~ (5).

~~(8)~~ ~~(9)~~ ~~(10)~~ (8) If a change is not completed as approved

by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

~~(9)~~ ~~(10)~~ ~~(11)~~ (9) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

~~(10)~~ ~~(11)~~ ~~(12)~~ (10) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

~~(11)~~ ~~(12)~~ ~~(13)~~ (11) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 4. Section 85-5-302, MCA, is amended to read:

"**85-5-302. Maintenance of headgates and measuring devices.** All persons using water ~~under-a-decree~~ from any stream or ditch whereon a water commissioner is appointed ~~shall--be~~ ~~is~~ ARE required to have suitable headgates at the point ~~wherein~~ where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head ~~thereof~~ as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in ~~such~~ the ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it ~~shall--be~~ is the duty of ~~such~~ the water commissioner not to apportion or distribute any water through ~~said~~ the ditch. The commissioner ~~must~~ shall notify all parties interested by ~~registered-or~~ certified mail or in person 1 week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a ~~registered-or~~ certified letter to the last known post-office address of any ~~such~~ interested party ~~will-be~~ is prima facie evidence of the fact that he was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay."

NEW SECTION. **Section 5.** Extension of authority. Any

existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

~~NEW-SECTION.--Section-6.--Retroactive----applicability.--[Sections--1--through--7]--apply--retroactively,--within-the meaning-of-1-2-109,-to-all-proceedings--pending--before--the department--of--natural--resources--and-conservation-on-[the effective-date-of-this-act].~~

NEW SECTION. **Section 6.** Effective date. [This act] is effective on passage and approval.

-End-

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on March 10, 1989, at 1:00 P.M.

ROLL CALL

Members Present: Senator Hubert Abrams, Senator Gary Aklestad, Senator Esther Bengtson, Senator Gerry Devlin, Senator Jack Galt, Senator Greg Jergeson, Senator Gene Thayer, Senator Bob Williams, and Chairman Tom Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

HEARING ON HOUSE BILL 399

Presentation and Opening Statement by Sponsor:

Representative Mark O'Keefe, House District 45, indicated the HB 399 was the biennial water rights clean-up bill. "Section one of the bill says in order to irrigate land either ground water or surface water, you need to have the permission of the owner. Under current statutes, there is a question about it." Representative O'Keefe stated section two conveys water right permits for new uses, under the 1973 water use law, will only be issued when there is water available. Section three of the bill was amended heavily in the House. "Now, section three does nothing. Section four requires that a water commissioner can require anyone with a pre-1973 right to measure their water, but they can't require that a post-1973 right to measure their water. This bill would give them that authority."

List of Testifying Proponents and What Group They Represent:

Don McIntrye representing DNRC
Jo Brunner representing Water Resource Council

List of Testifying Opponents and What Group They Represent:

Carol Mosher representing Montana Stockgrowers Association and the Montana CattleWomen
Valerie Larson representing the Montana Farm Bureau

Testimony:
Proponent:

Don McIntyre said, "A couple of years ago, the legislature did change the water commissioner bills to allow a water commissioner to measure the right...of certificate holders on decreed streams." Mr. McIntyre stated that the water commissioners section of the bill was inadvertently left off. "All this section does is clean up the bill." Mr. McIntyre explained that section one requires a person, who irrigates a piece of land, to ask for permission of the landowner to use the water. Section two deals with the point of diversion. "It is historically the way water use has been acquired in Montana prior to 1973. If you wanted to get a water right, you went down and looked in the stream to see if there was water at your point of diversion." Mr. McIntyre stated that this section did not change adverse affect as one of the criteria of getting a permit in the State of Montana. Section three has been taken out by the House. "Section three was to provide for a trial change."

Jo Brunner - See exhibit 2

Testimony:
Opponent:

Carol Mosher stated that they opposed the bill. In section two, page 5, lines 7 and 8, Ms. Mosher explained the new section in this bill had a potential for conflict and adverse effects to a senior water user, who may be remote from the point of diversion.

Valerie Larson indicated that Montana Farm Bureau opposed HB 399 for the same reasons Carol Mosher previously stated.

Questions From Committee Members: Senator Jergeson asked Carol Mosher, "If the committee removed the language at the closed point of diversion, would your organization still oppose the bill?" Ms. Mosher indicated they would support the bill if that language was removed by the committee.

Senator Beck - "The first part of the bill allows you to

irrigate on somebody else's land. Why do you have to have the land owners permission? What was the basis of this decision?" Representative O'Keefe, "As the statutes now administer, any appropriator may legally withdraw water from a well that is on another persons property. A person may apply for permitted increase through the place of use through the DNRC without the land owners approval." Representative O'Keefe explained that ground water as well as surface water would be covered under the section.

Senator Bengtson - "Does this bill addressed what we had previous to this?" Ted Doney indicated that Senator Bengtson's bill was a `point of diversion' bill and this bill was a `place of use' bill.

Closing by Sponsor: Representative O'Keefe closed.

HEARING ON HOUSE BILL 650

Presentation and Opening Statement by Sponsor:
Representative Swysgood, House District 73, stated HB 650 created a sub-district within an irrigation district. See exhibit 4 for further testimony.

List of Testifying Proponents and What Group They Represent:

Jo Brunner representing the Montana Resources Association

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Jo Brunner - See exhibit 3.

Questions From Committee Members: Senator Aklestad - "Before they can do this, do they have to get authority from the original district?" Representative Swysgood - "Yes."

Senator Aklestad - "How do they get that authority from the district?" Representative Swysgood - "Section one allows a creation of this district with at least 60% of the number acreage as it's current law. Then section two requires public notice of a drain on the proposed sub-lease. Section three requires and sets guidelines for the public on the proposed districts. Section four specifies a criteria for the board of commissioners for

ROLL CALL

AGRICULTURE COMMITTEE

DATE 3/10/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SENATE AGRICULTURE
EXHIBIT NO. 1
DATE 3/10/89
BILL NO. HB 650, 616 413, 399

BILL SUMMARY-SENATE AGRICULTURE COMMITTEE
MARCH 10, 1989
PREPARED BY DOUG STERNBERG, COMMITTEE STAFF

HB 399 Section 1: requires a possessory property interest, as well as exclusive property rights in groundwater development works, as part of the exception to groundwater appropriation

Section 2: requires proof of unappropriated water at the proposed point of diversion as a part of permit issuance criteria; includes "reasonable availability" in amount criteria; requires proof of a possessory interest or written consent of the person with a possessory interest as a part of permit issuance criteria

Section 3: requires an applicant's proof of a possessory property interest, or the written consent of the person with a possessory property interest, in order for approval of a change in appropriation right (see p. 11, lines 17-20 for amendment)

Section 4: deletes "decree" requirement from law mandating suitable headgates; deletes "registered mail" requirement from notice provisions; makes minor changes in grammar

Section 5: extends present agency rulemaking authority

Section 6: provides immediate effective date

HB 413 Section 1: makes discretionary rather than mandatory ("shall" to "may", p. 2, line 21) appointment of a water commissioner upon application by both the DNRC and one or more holders of valid water rights; allows costs to DNRC if it applies for appointment of a water commissioner

Section 2: provides an immediate effective date

HB 616 Section 1: raises from $24 to $32 the amount of insurance that may be written on each acre of grain on nonirrigated land and from $48 to $56 per acre on irrigated land

Section 2: raises from $24 to $32 the amount payable for loss per acre of grain on nonirrigated land and from $48 to $56 per acre of irrigated land

Section 3: extends present agency rulemaking authority

Section 4: provides an immediate effective date

HB 650 Section 1: allows an irrigation district board of commissioners to establish by petition one or more subdistricts; outlines information required in the petition

Section 2: establishes notice requirements for a hearing on the petition

Section 3: provides hearing requirements

Section 4: allows creation of a subdistrict following hearing; establishes a procedure for petition review

Section 5: provides for alteration of subdistrict acreage and determination of taxable area in the same manner as for irrigation districts

Section 6: provides for dissolution of subdistricts in the same manner as for irrigation districts

Section 7: allows a district to sell bonds to government entities by negotiation and without public advertisement or solicitation of bids

Ex. #1
3-10-89

Section 8: allows the board of commissioners to acquire lands and property for the operation of a subdistrict; requires a majority of subdistrict landholders to approve property acquisition

Section 9: extends board authority to furnish sufficient water to subdistricts

Section 10: extends board authority over property of subdistricts

Section 11: allows board disposition of property that substantially benefits a subdistrict

Section 12: provides for equitable apportionment of water to a subdistrict; allows board disposal of surplus subdistrict water

Section 13: extends definition of "distribution system" to subdistricts

Section 14: limits indebtedness incurred on behalf of a subdistrict

Section 15: allows issuance of negotiable fully registered bonds or negotiable coupon bonds to establish a reserve for payment of principle and interest on irrigation district bonds

Section 16: establishes petition requirements for bonds issued on behalf of subdistricts

Section 17: establishes bond issuance procedures on subdistrict bonds

Section 18: provides refunding bond requirements on subdistrict bonds

Section 19: extends bond lien provisions to subdistrict bonds; extends lien applicability from 8 years after maturity to time of discharge of obligations

Section 20: revises bond sale notice provisions to include exception for bonds sold under sec. 7

Section 21: extends tax and assessment provisions for paying bonds and interest to subdistrict bonds

Section 22: includes added subdistrict lands in land obligated for payment of bonded indebtedness

Section 23: includes all subdistrict lands in payment of charges for works and federal and state contracts

Section 24: establishes procedure for subdistrict levies

Section 25: includes subdistricts in procedure for determining irrigable area

Section 26: includes subdistrict land in tax liens

Section 27: requires preparation of list of subdistrict land

Section 28: includes nonirrigable subdistrict land as nontaxable

Section 29: includes subdistrict landholders in petition process for judicial review of board actions

Section 30: extends to subdistricts burden of costs upon issuance of bonds

Section 31: includes subdistrict landowners in objection process when a determination is made of irrigable area or tax rate per acre

Section 32: includes subdistrict land in restrictions on reduction of taxable acreage

Ex. #1
3-10-89

Section 33: codifies new secs. 1-7 in irrigation district law

Section 34: standard saving clause
Section 35: standard severability clause
Section 36: provides immediate effective date

SENATE AGRICULTURE
EXHIBIT NO. 2
DATE 3/10/89
BILL NO. HB 399

HB399 O'KEEFE MAR. 10,1989

MONTANA WATER RESOURCES ASSOCIATION, JO BRUNNER, EXEC. SEC.

SENATE AG. COMM. SUPPORT X AMEND OPPOSE

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE -

The Montana Water Resources Association wishes to go on record as in support of HB399, as amended in third reading.

Our early opposition to the bill had to do with the trial change in appropriation rights and as that has been eliminated, we remove our opposition.

Thank you.

DATE 3/10 1 of 3

COMMITTEE ON Agriculture

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
Larry Johnson	Montana Grain Growers	HB616	✓	
Larry Christensen	Montana Grain Growers	HB616	✓	
Robert & Shirley Anderson	Crop Insurance	616		✓
Riley Johnson	Crop Insurance Coalition	616		✓
R L Nelson	Mountain States Ins	616		✓
Richard Hitchcock		616	✓	
Brad Luer	Mont Farm Bureau	616	✓	
MIKE WATERS	MONTANA GRAIN GROWERS	616	✓	
CHUCK MERJA	Montana Grain Growers	616	✓	
RANDY Johnson	" " "	616	✓	
Max E. Nield	" " "	616	✓	
Bess Campbell	" " "	616	✓	
Alfred Tacon	" " "	616	✓	
Chuck Lee	" " "	616	✓	
Ted Belcher		616	✓	
Robert Taylor		616	✓	
Jerry Asbelmer	Crop Ins. Coal	616		✓
Beth Liberty	MGGA	616	✓	
Jeff Bryant	Farm Bureau	616		✓
Bill Yellowtail	Blaine Crop Hail	616		✓
Ray Woodahl	Crop Group Hail	616		✓
Edward Hollister	Conlan Co Ins Co	616		✓
Don Robinson	F-P Assoc Ins. Inc.	616		✓
Bob Burns		616		—
Reid Stuart	Dye Tabary & Judge	616		✓
Jim Bjelland Jr.	Montana Grain Growers	616	✓	

DATE 3/10 2 of 3.

COMMITTEE ON Agriculture

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Lee Heiss	MT Grain Growers Ass	616	/	
Doug Dyer	State Hail Board	616	✓	
Carol Mosher	MT Cattle Women	399		X
Ron de Young	MT. Farmers Union	616	✓	
Dave Sage	MT Grain Growers	616	✓	
Alvin W. Zinn	ZINNE BROS	616	✓	
Marvin Baylor	A P A	HB 399		✓
Roger McGlenn	ITAM	HB 616		✓
William C. Hackett	Hackett Agency	HB-616	✓	✓
Jack Olsen	Northern Ins Agency	HB 616		✓
Clarke L. Draper	Northern Ins. Agency	HB-616		✓
[illegible]	MWRA	399 413 652	✓	
Ernest Knottland	Dept of Ag	616		
Terry Murphy	Sec of St	616	✓	
William Kunz	Farm Bureau	HB 399		✓
Vicki Fasbender	Stroud Crop	616		✓
Richard E. Nelson	Self	616	✓	
Ken Foster	Self	616	✓	
Mark Mueller	[illegible]	616	✓	
Mark Rasmussen	Mont. Grain Growers	616	✓	
VERNON L. WESTLAKE	REP H.D. 76	413	✓	
Tony Meyerding	WIFE	616	✓	
John W Patterson	HD 97	HB 616	X	
Tom McCullough	DNRC	HB 399	X	
Roger DeBruycker	Dist 13	HB 616	X	
Barney Barnett		HB 616		X

DATE 3/10 30

COMMITTEE ON Ag. — MINUTES

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Oppo
Andrew C. Neal	M-L Farm Bureau	413	✓	
Dale Fossen	Farmer, Mgr. County Commissioner	616	✓	
Kenneth Anderson	Farmer	616	✓	
Marvin Barber	APA	HB 413 HB 650	X	
Lowell Mosher	Mt. Stockgrowers	HB 413	✓	

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on March 17, 1989, at 1:00 p.m.

ROLL CALL

Members Present: Senator Hubert Abrams, Senator Gary Aklestad, Senator Esther Bengtson, Senator Gerry Devlin, Senator Jack Galt, Senator Greg Jergeson, Senator Gene Thayer, Senator Bob Williams, and Chairman Tom Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

DISPOSITION OF HOUSE BILL 413

Discussion: Doug Sternberg explains the amendments to HB 413. See exhibit 1.

Senator Aklestad-"Was there something brought up about a fiscal note? Was there one prepared for it?" Senator Beck-"I don't think there was."

Representative Westlake-"We requested that to be looked at when the EQC drew this up in the first place. They said no there is no need of a fiscal note."

Amendments and Votes: Senator Devlin moved the amendments to HB 413; the motion was seconded by Senator Aklestad. The motion carried unanimously.

Recommendation and Vote: Senator Thayer moved HB 413 BE CONCURRED IN AS AMENDED; the motion was seconded by Senator Aklestad. The motion carried unanimously. Senator Boylan was assigned to carry the bill.

DISPOSITION OF HOUSE BILL 542

Discussion: Doug Sternberg explained the amendments to HB 542. See exhibit 2.

Senator Galt wanted to know the definitions of "clear and convincing" and "substantial credible". Don MacIntyre- "The burden of proof is by a standard either clear and convincing or substantial credible. You're saying that burden remains on that party throughout the process. In law there are basically three standards. The standards are preponderance of evidence, clear and convincing evidence, and beyond a reasonable doubt. Beyond a reasonable doubt is saved for criminal cases. The basic standard in courtroom work is preponderance of evidence. Clear and convincing is saved for special cases. Substantial credible is generally a reviewing standard. For example, after a trial you go to the Montana Supreme Court, the Montana Supreme Court would look at the record to see whether there was substantial evidence in the record to uphold the verdict. If they though there was they wouldn't do it. The term substantial credible has snuck in, in my opinion, to replace preponderance of the evidence. Clear and convincing is a much higher standard. Clear and convincing is the words indicating the evidence is very strong evidence. You are convinced as a reasonable person that the fact that should be believed. When you are generally talking about substantial credible, substantial evidence can be made by one witness. There could be seven witnesses on the other side that are arguing the other side of the issue. Substantial evidence can be produced by the one witness."

Amendments and Votes: Senator Thayer move the amendment to HB 542; the motion was seconded by Senator Aklestad. The motion carried with Senator Bengtson voting no.

Recommendation and Vote: Senator Aklestad moved HB 542 BE CONCURRED AS AMENDED; Senator Devlin seconded the motion. The motion carried unanimously.

DISPOSITION OF HOUSE BILL 399

Discussion: Ron Waterman explained the proposed amendment on page 5, line 8.

Senator Aklestad-"The existing water rights that burden of proof would have to be placed on the new appropriator, does that...?"

Senator Beck-"That's the way I understand it."

Senator Aklestad-"Is that right, Mr. Waterman? The new applicant would have to bear the burden of proof that

there is not going to be an adverse affect?"

Ron Waterman-"As the language now reads that would be another element that the applicant still has to prove. That is if there is not an adverse affect. However, the experience I have seen is that what happens, that burden gets picked up on by the objector, simply because the objector usually has the hydrological information that's available as to what will happen with respect to a new use application. The way it reads now, the burden of proof is on the applicant to show that there is no adverse consequence that you're approving a negative. What I have seen before the Department of Natural Resources has been that type of proof is usually satisfied quickly; there is water available for appropriation and we don't think there is going to be any adverse effect upon this hearing. Then the burden of proof shifts. Those objectors who then come forward with the evidence showing `Yes, indeed there will be an adverse effect on the right'."

Senator Aklestad-"The proposed amendments would do what?"

Senator Beck-"It would get rid of on page 5, line 8, eliminate at `the proposed point of diversion'. Am I correct in saying?"

Senator Aklestad-"The question is, is the policy the department has been following they have determined at the proposed point of diversion, that's the policy what are you going to do now? If it's taken out?"

Gary Fritz-"I think it's a very clear policy choice. If you leave the bill as it is, you go ahead and take a close look at whether permits ought to be issued or not. You change the bill the way the farm bureau wants you to, then its going to be much more difficult for people to get permits for new uses. That's the way we...542 and 399 combined, the way its amended you're going to make it extremely difficult for people to get permits for new uses in the State of Montana. That's what I'm saying. It's a clear policy choice that you have to make on 542 and 399. That's the bottom line difference."

Senator Aklestad-"That clarifies for me and I guess I agree with that. I think we have a situation in the state where we are the department and we are over-appropriating water, which I think is going to lead us into litigation. I think we should strike the language."

Senator Bengtson-"Why is there a need for flexibility? Is it important in the state as we look to people that need water?"

Gary Fritz-"The real situation that we're faced with in the state, our large downstream facilities have serious consequences on people upstream being able to use water. The question in this bill, someone would have to prove that waters are or are not totally appropriated by that downstream hydropower right or can an irrigator that wants to irrigate 80 acres, show that their water is available right at his point of diversion and then he still has to answer the question whether there is an adverse impact to that down stream power right. That's the real-life serious implication that's involved in this bill. You want to try to encourage new development or are you going to block the water up in this state solely for those who have existing permits? I'm not saying that's the question you are being presented to you. If you change this bill the way the opponents would like you to do, that's a step in that direction you are taking. Those who have the water rights it will be easy for them to keep them. Those who don't it will be difficult."

Senator Aklestad-"I agree. I think it's going to be more difficult. I think it should be more difficult, but it is in no way locking out new development. We have a bill we passed the other day that put primarily the same language in; it passed by almost an unanimous vote. We passed `clear and convincing'--it's underground water we were dealing with. It's far more restrictive than taking the words out of this bill (HB 399)."

Senator Bengtson-"I agree that was a policy change as well. Well, it just doubles the trouble, that's what it does. I'm going to oppose deleting that language. You know times are changing. There has to be a policy decision that there is a sharing. Just like you know I've got mine and its--and what is mine is mine forever. I think there has to be some flexibility. I would reject deleting that language."

Senator Aklestad-"I would like to interject one other point the committee has already taken action on and that was the proposal that came in before this committee to open up the time for them to apply for water. And there was a lot of convincing evidence here that have to do with that but were overroad that, thinking we would just open the floodgates and those people didn't have their application in on time. And we realize that there were

limited amounts of water in these streams for applicants to apply for. I think that's why we voted that particular down. That coincides with what we're trying to accomplish here."

Senator Bengtson-"I think it's diametrically opposed to what the governor wanted in the water policy."

Amendments and Votes: Senator Aklestad moved to amend HB 399 page 5, line 8, on "at the proposed point of diversion". The motion failed with Senator Aklestad and Senator Beck voting yes.

Recommendation and Vote: Senator Thayer moved HB 399 to BE CONCURRED IN; Senator Devlin seconded the motion. The motion carried with Senator Aklestad and Senator Beck voting no. Senator Weeding was assigned to carry the bill.

DISPOSITION OF HOUSE BILL 367

Discussion: Doug Sternberg explained the amendments to HB 367. See exhibit 3.

Representative O'Keefe-"The amendments were brought to me by Senator Himsl. The long-range building people thought those amendments ought to go in. The department had no problem with them. I thought they were great."

Amendments and Votes: Senator Jergeson moved to amend HB 367; the motion was seconded by Senator Aklestad. The motion carried.

Recommendation and Vote: Senator Bengtson moved HB 367 BE CONCURRED IN AS AMENDED; Senator Devlin seconded the motion. The motion carried unanimously. Senator Weeding was assigned to carry the bill.

DISPOSITION OF HOUSE BILL 477

Discussion: Senator Bengtson explained her amendment. See exhibit 4.

Amendments and Votes: Senator Bengtson moved to amend HB 477. The motion failed with Senator Abrams, Senator Jergeson, and Senator Bengtson voting yes. Senator Thayer, Senator Aklestad, Senator Devlin, Senator Galt, Senator Williams, and Senator Beck voting no.

Recommendation and Vote: Senator Galt moved HB 477 BE CONCURRED IN. The motion carried with Senator

ROLL CALL

AGRICULTURE COMMITTEE

DATE 3/17/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

March 17, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration HB 399 (third reading copy -- blue), respectfully report that HB 399 be concurred in.

Sponsor: O'Keefe (Weeding)

BE CONCURRED IN

Signed: Thomas A. Beck
Thomas A. Beck, Chairman

3:18 pm 3/18

scrhb399.317

ROLL CALL VOTE

SENATE COMMITTEE AGRICULTURE

Date 3/17 Bill No. HB399 Time #1

NAME		YES	NO
Senator Hubert Abrams	#8		–
Senator Gary Aklestad	#1	–	
Senator Esther Benatson	#27		–
Senator Gerry Devlin	#47		–
Senator Jack Galt	#46		–
Senator Greg Jergeson	#48		–
Senator Gene Thayer	#23		–
Senator Bob Williams	#39		–
Senator Tom Beck	#44	–	
		2	7

Jaelene Johnson
Secretary

Tom Beck
Chairman

Motion: Delete amendment on page 5, line 8. "at the proposed point of diversion." failed

SF-3 (Rev. 1987)

ROLL CALL VOTE

SENATE COMMITTEE AGRICULTURE

Date 3/17 Bill No. HB399 Time #2

NAME		YES	NO
Senator Hubert Abrams	#8	✓	
Senator Gary Aklestad	#1		✓
Senator Esther Benatson	#27	✓	
Senator Gerry Devlin	#47	✓	
Senator Jack Galt	#46	✓	
Senator Greg Jergeson	#48	✓	
Senator Gene Thayer	#23	✓	
Senator Bob Williams	#39	✓	
Senator Tom Beck	#44		✓
		7	2

Jaelene Johnson
Secretary

Tom Beck
Chairman

Motion: HB399 to be concurred in. -passed

SF-3 (Rev. 1987)

Total 47

Noes: None.
Total 0

Excused: Farrell.
Total 1

Absent or not voting: Jergeson, Pinsoneault.
Total 2

HB 425 - Senator Pinsoneault moved that consideration of HB 425 on second reading be passed. Motion carried.

HB 336 - Senator Rasmussen moved that HB 336 be taken from engrossing and returned to second reading. Motion failed as follows:

Ayes: Aklestad, Beck, Devlin, Hammond, Harding, Himsl, Hofman, Jenkins, Keating, McLane, Meyer, Nathe, Noble, Rasmussen, Severson, Story, Thayer, Tveit, Mr. President.
Total 19

Noes: Abrams, Anderson, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Eck, Farrell, Gage, Hager, Halligan, Harp, Jacobson, Jergeson, Lynch, Manning, Mazurek, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Regan, Stimatz, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail.
Total 31

Paired: Hofman, Aye; Farrell, No.

Excused: None.
Total 0

Absent or not voting: None.
Total 0

HB 569 - Senator Thayer moved that HB 569 be taken from engrossing and returned to second reading. Motion failed as follows:

Ayes: Aklestad, Anderson, Devlin, Farrell, Himsl, Hofman, Keating, Story, Thayer, Van Valkenburg, Mr. President.
Total 11

Noes: Abrams, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Lynch, Jacobson, Jenkins, Jergeson, Manning, Mazurek, McLane, Meyer, Nathe, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Tveit, Vaughn, Walker, Weeding, Williams, Yellowtail.
Total 38

Paired: Farrell, Aye; Lynch, No.

Excused: None.
Total 0

Absent or not voting: Noble.
Total 1

FIRST READING OF BILLS

The following House bills were introduced, read first time, and referred to committees:

HB 54, introduced by Hanson, Nisbet, Gervais, Pinsoneault, Gage, Yellowtail, Cody, Russell (by request of the Committee on Indian Affairs), referred to Committee on State Administration
HB 325, introduced by Marks, Cobb, Keating, referred to Committee on Rules
HB 370, introduced by Cocchiarella, O'Keefe, referred to Committee on State Administration
HB 373, introduced by Hannah, Driscoll, Spaeth, Simon, referred to Committee on State Administration
HB 462, introduced by Harper, Marks, Weeding, Yellowtail, Bishop, O'Keefe, Severson, referred to Committee on Agriculture, Livestock, and Irrigation
HB 463, introduced by Thoft, Harper, Hannah, Grady, Yellowtail, Abrams, Devlin, Walker, O'Keefe, Raney, Severson, referred to Committee on Agriculture, Livestock and Irrigation
HB 469, introduced by Addy, Blaylock, Ramirez, Rehberg, Patterson, T. Nelson, Glaser, Simon, Keller, Hannah, Keating, Roth, Whalen, Driscoll, Kilpatrick, Bengtson, Crippen, Kimberley, Bishop, Hager, McLane, McDonough, referred to Committee on Finance and Claims
HB 614, introduced by Wyatt, Van Valkenburg, Cocchiarella, Lynch, Walker, Grady, Gould, Peck, Harrington, Menahan, Pavlovich, Driscoll, Bradley, Marks, O'Connell, McDonough, Squires, Kadas, McCormick, Bachini, Vincent, referred to Committee on Public Health, Welfare and Safety
HB 736, introduced by Gould, Harp, Rehberg, referred to Committee on Business and Industry
HJR 30, introduced by Clark, Galt, Simon, T. Nelson, Keller, Lynch, Kimberley, Kilpatrick, Hannah, Addy, McLane, Keating, Anderson, Nathe, Hager, Blaylock, Regan, Bishop, D. Brown, Jergeson, Patterson, Hanson, Spaeth, Grinde, Rehberg, Roth, McDonough, Giacometto, Good, Gould, Peterson, Knapp, Wallin, Eudaily Swift, Aafedt, Owens, Smith, Hayne, Hoffman, Guthrie, Campbell, Glaser, Bradley, Driscoll, Quilici, Zook, Boharski, referred to Committee on Fish and Game

SECOND READING OF BILLS (COMMITTEE OF THE WHOLE)

Senator Gage moved that the Senate resolve itself into a committee of the whole for the consideration of business on second reading. Motion carried. Senator Yellowtail in the chair.

Mr. President: We, your Committee of the Whole having had under consideration business on second reading, recommend as follows:

HB 378 - Senator Rasmussen moved that HB 378 be concurred in. Motion carried unanimously, 49-0.

HB 399 - Senator Weeding moved that HB 399 be concurred in. Motion carried 45-4; Hofman, McLane, Nathe, and Severson voting no.

HB 477 - Senator Bengtson moved that HB 477 be amended. Motion failed as follows:

Ayes: Bengtson, Bishop, Blaylock, Crippen, Hager, Jergeson, Keating, Meyer, Nathe, Regan, Vaughn.
Total 11

Noes: Abrams, Anderson, Beck, Boylan, Devlin, Eck, Gage, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Lynch, Mazurek, McLane, Noble, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen,

Senator Gage moved the Senate adjourn until 8 a.m., Thursday, March 23, 1989. Motion carried.

Senate adjourned at 4:36 p.m.

JACK E. GALT
President of the Senate

JOHN W. LARSON
Secretary of the Senate

SIXTY-SEVENTH LEGISLATIVE DAY

Helena, Montana
March 23, 1989

Senate Chambers
State Capitol

Senate convened at 8 a.m., Mr. President in the chair. Invocation by Chaplain Tom Banks. Pledge of allegiance to the flag.

Roll call. All members present except Farrell, excused. Quorum present.

THIRD READING OF BILLS

The following bills having been read three several times, title and history agreed to, were disposed of in the following manner:

HB 57 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 49

Noes: None.
Total 0

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 378 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail.
Total 45

Noes: Beck, Devlin, Pinsoneault, Mr. President.
Total 4

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 399 concurred in by the following vote:

Ayes: Abrams, Beck, Bengtson, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Himsl, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Noble, Norman, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 41

Noes: Aklestad, Anderson, Bishop, Harp, Hofman, Nathe, Pinsoneault, Severson.
Total 8

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 413 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Keating, Lynch, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 47

Noes: Jergeson, Manning.
Total 2

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 477 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Boylan, Brown, Eck, Gage, Halligan, Hammond, Harding, Himsl, Hofman, Jacobson, Jenkins, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Severson, Stimatz, Story, Thayer, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 38

Noes: Bengtson, Bishop, Blaylock, Crippen, Devlin, Hager, Harp, Jergeson, Nathe, Regan, Tveit.
Total 11

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 504 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 49

Noes: None.
Total 0

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 534 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 49

Noes: None.
Total 0

Excused: Farrell.
Total 1

Absent or not voting: None.
Total 0

HB 544 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Yellowtail, Mr. President.
Total 48

Noes: None.
Total 0

Excused: Farrell.
Total 1

Absent or not voting: Williams.
Total 1

HB 568 concurred in by the following vote:

Ayes: Abrams, Aklestad, Anderson, Beck, Bengtson, Bishop, Blaylock, Boylan, Brown, Crippen, Devlin, Eck, Gage, Hager, Halligan, Hammond, Harding, Harp, Himsl, Hofman, Jacobson, Jenkins, Jergeson, Keating, Lynch, Manning, Mazurek, McLane, Meyer, Nathe, Noble, Norman, Pinsoneault, Pipinich, Rapp-Svrcek, Rasmussen, Regan, Severson, Stimatz, Story, Thayer, Tveit, Van Valkenburg, Vaughn, Walker, Weeding, Williams, Yellowtail, Mr. President.
Total 49

Noes: None.
Total 0

Excused: Farrell.
Total 1

HOUSE BILL NO. 399

INTRODUCED BY O'KEEFE, WEEDING, IVERSON, HARPER

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER USE LAWS; REQUIRING A POSSESSORY INTEREST IN THE PROPERTY ON WHICH WATER WILL BE APPLIED IN ORDER TO OBTAIN A PERMIT OR TO APPROPRIATE GROUNDWATER; MODIFYING THE CRITERIA FOR ISSUING A PERMIT AND FOR APPROVING A CHANGE APPLICATION; ~~PROVIDING--FOR--A--TRIAL--CHANGE--IN--APPROPRIATION---RIGHT;~~ CLARIFYING THE JURISDICTION OF A WATER COMMISSIONER TO MAINTAIN HEADGATES; AMENDING SECTIONS 85-2-306, 85-2-311, 85-2-402, AND 85-5-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE ~~AND-A-RETROACTIVE-APPLICABILITY-DATE~~."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-306, MCA, is amended to read:

"**85-2-306. Exceptions to permit requirements.** (1) Groundwater may be appropriated only by a person who has ~~either~~ a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the groundwater development works or, if another person has rights in the groundwater development works, the written consent of the person with those property rights. Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date of refiling a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall

be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of the claim of existing water right. An appropriation under this subsection is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules

adopted by the board under 85-2-113."

Section 2. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) ~~throughout~~ during the period ~~during~~ in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not

contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,

impoundment, use, or restraint contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, use, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 3. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

~~(2)--The--department,--after---providing---notice---and opportunity---for---hearing--pursuant--to--85-2-307--through 85-2-309,-may-approve-an-application-for-a-trial--change--in appropriation--right--for-a-period-not-to-exceed-3-years.-In approving--an--application--under---this---subsection,---the department-shall-find-from-the-available-evidence-that:~~

~~(a)--substantial-injury-to-any-appropriator-of-water-is unlikely--to-occur-but-that-the-precise-effect-of-the-change on-other-appropriators-is-difficult-to-determine-in--advance of-the-change;-and~~

~~(b)--the--requirements--of--subsections--(3)(b)-through (3)(d)-are-met-and-it-is-likely-that-the-other--requirements of-this-section-can-be-met.~~

~~(3)--(A)-IF--THE-DEPARTMENT-APPROVES-AN-APPLICATION-FOR A-TRIAL-CHANGE-IN-APPROPRIATION-RIGHT-UNDER-SUBSECTION--(2):~~

~~(I)--THE---APPROPRIATOR---SHALL--ALLOW--ACCESS--BY--THE DEPARTMENT-THROUGHOUT-THE-TRIAL-PERIOD-TO-THE-SITE-WHERE-THE CHANGE-IS-BEING-IMPLEMENTED;~~

~~(II)-THE-DEPARTMENT-SHALL-INSPECT--THE--SITE--UPON--THE REQUEST--OF--ANY--PERSON--HOLDING-A-VALID-WATER-RIGHT-IN-THE SOURCE-OF-SUPPLY;-AND~~

~~(III)-ANY-WATER-USER-MAY,-THROUGHOUT-THE-TRIAL--PERIOD, PETITION--THE--DEPARTMENT--TO-TERMINATE-THE-TRIAL-CHANGE-AND DENY-THE-APPLICATION-FOR-A--CHANGE--IN--APPROPRIATION--RIGHT BECAUSE--WATER-USERS-ARE-EXPERIENCING-ACTUAL-ADVERSE-EFFECTS OF-THE-TRIAL-CHANGE.--THE-DEPARTMENT-SHALL--INVESTIGATE--THE ALLEGATIONS--CONTAINED--IN--A-PETITION-AND,-IF-IT-DETERMINES THAT-THERE-ARE-ADVERSE-EFFECTS,-THE--TRIAL--PERIOD--MUST--BE TERMINATED--AND--THE-APPLICATION-FOR-CHANGE-IN-APPROPRIATION RIGHT-MUST-BE-DENIED-UNLESS-THE-APPLICANT-CAN--ESTABLISH--BY CLEAR--AND--CONVINCING-EVIDENCE-THAT-THE-ADVERSE-EFFECTS-ARE CAUSED-BY-UNIQUE-CLIMATOLOGICAL-EVENTS-OR--OTHER--UNFORESEEN CIRCUMSTANCES--THAT--WILL-NOT-RECUR-THROUGHOUT-THE-REMAINDER OF-THE-TRIAL-PERIOD.~~

~~(B)--IF-THE-APPLICATION--FOR--CHANGE--IN--APPROPRIATION~~

~~RIGHT--IS--DENIED--DURING--OR--AFTER--THE--TRIAL-PERIOD,-THE DEPARTMENT-SHALL-REQUIRE--THE--APPROPRIATOR--TO--REMOVE--THE DIVERSION--STRUCTURES--OR--FACILITIES--THAT--IMPLEMENTED-THE TRIAL-CHANGE.~~

~~(2)~~(3)~~(4)~~(2) Except as provided in subsections ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) through ~~(5)~~ ~~(6)~~ ~~(7)~~ (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

~~(3)~~(4)~~(5)~~(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands ~~of~~ for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

~~(4)~~(5)~~(6)~~(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5

or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) and ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

~~(5)~~~~(6)~~~~(7)~~(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature

approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection ~~(2)~~ ~~(3)~~ ~~(4)~~ (2) or ~~(3)~~ ~~(4)~~ ~~(5)~~ (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections ~~(5)(b)(i)~~ ~~(6)(b)(ii)~~ ~~(7)(B)(III)~~ (5)(B)(II) and ~~(5)(b)(ii)~~ ~~(6)(b)(iii)~~ ~~(7)(B)(IV)~~ (5)(B)(III) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in

the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

~~(6)~~ ~~(7)~~ ~~(8)~~ (6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

~~(7)~~ ~~(8)~~ ~~(9)~~ (7) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312~~(3)~~ (5).

~~(8)~~ ~~(9)~~ ~~(10)~~ (8) If a change is not completed as approved

by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

~~(9)~~ ~~(10)~~ ~~(11)~~ (9) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

~~(10)~~ ~~(11)~~ ~~(12)~~ (10) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

~~(11)~~ ~~(12)~~ ~~(13)~~ (11) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 4. Section 85-5-302, MCA, is amended to read:

"**85-5-302. Maintenance of headgates and measuring devices.** All persons using water ~~under-a-decree~~ from any stream or ditch whereon a water commissioner is appointed ~~shall--be~~ ~~is~~ ARE required to have suitable headgates at the point ~~wherein~~ where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head ~~thereof~~ as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in ~~such~~ the ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it ~~shall--be~~ is the duty of ~~such~~ the water commissioner not to apportion or distribute any water through ~~said~~ the ditch. The commissioner ~~must~~ shall notify all parties interested by ~~registered-or~~ certified mail or in person 1 week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a ~~registered-or~~ certified letter to the last known post-office address of any ~~such~~ interested party ~~will-be~~ is prima facie evidence of the fact that he was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay."

NEW SECTION. **Section 5.** Extension of authority. Any

existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

~~NEW-SECTION.--Section-6.--Retroactive----applicability.-[Sections--1--through--7]--apply--retroactively,--within-the meaning-of-1-2-109,-to-all-proceedings--pending--before--the department--of--natural--resources--and-conservation-on-[the effective-date-of-this-act].~~

NEW SECTION. **Section 6.** Effective date. [This act] is effective on passage and approval.

-End-